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THE  
N.Y. WEEKLY DIGEST

OF CASES DECIDED

IN THE

N. Y. Court of Appeals, and General Terms of the N. Y. Supreme,  
Common Pleas and Superior Courts.

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# TABLE OF CASES DIGESTED.

A		PAGE	
Acker et al. v. Leland et al.	366	Briggs et al. v. Van Buren et al.	216
Adair et al. v. Brimmer et al., exrs.	59	Bronk v. The B. & A. RR. Co.	259
Adams et al., exrs., v. Benson et al., exrs.	539	Burgett v. Strickland, admrx.	124
Adams v. Robeson, impld.	468	Burghard, recr., v. Sondheim et al.	852
Allen v. Allen	212	Burnap v. The National Bk. of Potsdam.	157
Anderson v. Doty	440	Burr v. De la Vergne	573
Anderson v. The Equitable Gaslight Co.	471	Burrowes v. Peck	15
et al.	471	Byrnes v. Robinson	454
Anderson v. The Market Natl. Bk.	878	C	
Andrade et al., admrs., v. Cohen, admr., et al.	209	Carleton v. The Mayor, &c., of N. Y.	854
Anthony v. Wood et al.	177	Chadwick v. Woodward	456
Archer v. The N. Y., N. H. & H. RR. Co.	10	Chase et al. v. Knowles	89
Armitage v. Mace	520	Clafin v. Hirsch	248
B		Clark v. Mackin et al., exrs, impld.	8
Baker v. McLaughlin et al.	29	Clarke v. Davenport, comptroller	6
Barto et al. v. Stephan	164	Clegg v. Cramer et al.	23
Beardsley et al., assignees, v. Hotchkiss et al.	325	Coddington, assignee, v. Vandeventer et al.	136
Beck v. Kibble et al.	882	Coffin v. Lattin	434
Beckenbaugh v. Nally et al.	94	Coffin v. Scott et al.	418
Becker v. Barnum	94	Coffin et al. v. Stitt	23
Beckwith et al. v. Brackett et al.	568	Cohen et al. v. The Mayor, &c., of N. Y.	514
Belden et al. v. The State	27	Coleman v. King	551
Benn v. The First Nat'l Bank of Elmira.	206	Connor, exr., v. Keese et al.	131
Berney et al. v. Drexel et al.	848, 515	Cook et al., exrs., v. Munn et al.	898
Bingham v. Beckwith	422	Cooke v. The Lalance Grosjean Mfg. Co.	482
Bingham v. Burlingame, sheriff	447	Corbit v. Corbit et al.	77
Bird v. The Mayor, &c., of N. Y.	571	Cornell v. Cornell et al.	184
Black v. The Forty-second Street & Grand Street Ferry RR. Co.	24	Coykendall v. Constable et al.	169
Blanchard v. Tulip	145	Coyle, admrx., v. The L. I. RR. Co.	853
Bloomington v. Sherman	80	Crim et al., exrs., v. Starkweather, impld.	403
Bocock v. Cochran	214	Crosby v. Stephan, impld.	172
Bolz et al. v. Ridder	463	Crouse v. The Syracuse, Chenango & N. Y. RR. Co. et al.	174
Bown, admr., v. The Supreme Council of the Catholic Mut. Benefit Assn., impld.	483	Crowe, admr., et al. v. Lewin, exr.	85
Bradner et al. v. Holland et al., impld.	868	Crowley v. Miller	262
Brady v. Kingsland	461	Cuddeback v. Sherman et al.	86
Brennan v. Brennan	342	D	
		Dauchy et al. v. Tutt	490
		Decker v. Kitchen	879
		Defreest v. Defreest et al.	96

	PAGE
De Kay v. The N. Y., L. E. & W. RR. Co.	479
DeLafield v. White et al.	474
Delano, trustee, v. The Mayor, &c., of N. Y.	141
De Silver v. Holden.	487
Dewey v. Durham, admrx.	47
Dinsmore, Prest., v. Neresheimer et al.	45
Dodge v. St. John.	273
Donahue v. Kendall et al.	506
Donald v. Rockwell.	192
Dorland, admrx. v. The N. Y. C. & H. R. RR. Co.	76
Dressel v. The City of Kingston.	172, 288
Drury v. Wigg, admrx.	417
Duff v. Hutchinson et al.	20
Duffield v. Johnston.	254
Dunn v. The Star Fire Ins. Co.	531
Durant, recr., v. Kenyon et al.	195

## E

Earl v. Collins.	307
Easton v. Booth.	552
Edwards v. Jones.	524
Edwards v. The Berkshire Life Ins. Co.	423
Ehrgott v. The Mayor, &c., of N. Y.	319
Ellis, admr., v. The N. Y., L. E. & W. RR. Co.	84
Ellis v. The Phoenix National Bk.	183
Ellsworth, exr., v. The N. Y., L. E. & W. RR. Co.	211
Ellsworth, exr., v. The St. Louis, Alton & T. H. RR. Co.	369
Emmerich v. Heffernan et al.	851, 542
English v. Rumsey et al., exrs.	204

## F

Fadner v. The People.	433
Falkel v. Moore et al.	58
Ferguson v. The Massachusetts Mut. Life Ins. Co.	424
Finley, admr., v. Bent, exr., et al.	11
Finley et al. v. Fay.	362
Fischer v. Fischer.	343
Fitzgibbons et al. v. Freisen	458
Fitzsimmons v. Curley	499
Flack et al., exrs., v. The State.	83
Flint v. Bell et al.	267
Frank et al. v. Sprinze et al.	452
Freeman, exr., v. Coit, impld.	161
Friedman et al. v. The Gold & Stock Tel. Co.	68
Fullan v. Hooper.	93
Fulton v. Edgar.	429

## G

	PAGE
Gardner, exrx., v. Gardner.	249
Garwood v. The N. Y. C. & H. R. RR. Co.	416
Gearon v. The Bank for Savings, impld.	483
Glasing v. Sharp, recr.	517
Goetting v. Biehler et al.	555
Goldberg v. Roberts.	203
Goodwin et al. v. Bunzl et al.	509
Gossler et al. v. Lissberger.	291, 429
Gray v. Ryle, exrx.	350
Green v. Waite.	486
Gregory v. The Mayor, &c., of N. Y.	574
Grow v. Garlock et al.	518
Guinnip v. Close.	226

## H

Haberstich v. Fischer.	453
Haight et al. v. Brisbin, exr.	154
Haight v. The Mayor, &c., of N. Y. et al.	54
Hallock et al., exrs., et al. v. Scheyer et al.	372
Hancox v. Meeker, exr.	90
Hand, supr., v. The Board of Supervisors of Columbia Co. et al.	40
Hannon v. Agnew et al.	522
Harpending, admr., v. Arnot.	418
Harris v. Durkee.	355
Harris v. Lyman et al.	359
Harris et al., exrs., v. The Am. Baptist Home Missionary Society et al.	564
Harris v. Van Wart, assignee, et al.	298
Hartel v. Holland.	312
Harvey v. The Village of Little Falls.	48
Hayes v. The Bush & Denslow Mfg. Co.	436
Hedges v. Williams.	556
Hein, assignee, v. Davidson, sheriff.	176
Heintze v. The Mayor, &c., of N. Y.	507
Hellreigel v. Manning.	543
Henderson v. Scott.	255
Hepburn, recr., v. Montgomery et al.	26, 560
Hershberg v. Dinsmore, Pres't.	497
Hertzfield v. Parkes et al.	238
Hibbard v. Dayton et al.	152
Hickey v. Monell.	475
Hickey, by guardian, v. Taaffe.	67
Hills v. The Peekskill Savings Bk.	112
Hilsley v. Palmer et al., exrs.	209
Hinman v. Hare.	441
Hobson et al., exrs., v. Hale et al., impld.	218
Hoffman v. The N. Y., L. E. & W. RR. Co.	510
Holliday et al. v. Sprague, impld.	150
Horton v. Dorr et al.	224

# TABLE OF CASES DIGESTED.

v

	PAGE
Howell et al. v. Leavitt et al., exrs. ....	162
Howell v. Miller.....	72
Hoyt et al., admr., v. Tuthill et al. ...	437
Huntington v. Asher.....	519
Hurd v. The Hannibal & St. Joseph RR. Co. ....	464
Hussner, admr., v. The Brooklyn City RR. Co.....	111

## I

<i>In re</i> accounting of Consalus, exr.....	1
<i>In re</i> accounting of Jackson, trustee.....	270
<i>In re</i> accounting of Mahan, exr.....	239
<i>In re</i> accounting of Neilly, admr.....	85
<i>In re</i> accounting of exrs. of Tilden... ..	128
<i>In re</i> accounting of Wandell, guardian..	294
<i>In re</i> application of Ensign v. Cuyken- dall, recr.....	84
<i>In re</i> application of The Buff., N. Y. & P. RR. Co. v. McIntosh .....	189
<i>In re</i> application of The Eureka Basin Warehouse & Mfg. Co.....	179
<i>In re</i> application of The N. Y. C. & H. R. RR. Co. v. Pierce et al.....	367
<i>In re</i> application of the Water Comrs. of Amsterdam v. Chalmers et al.,... ..	361
<i>In re</i> application of Tiebolt.....	570
<i>In re</i> arbitration of Pool and Johnston...	43
<i>In re</i> assignment of Adams et al.....	526
<i>In re</i> Atty-Gen. v. The Continental Life Ins. Co.....	81
<i>In re</i> Bankard.....	452
<i>In re</i> estate of Boston.....	470
<i>In re</i> estate of L'Hommedieu.....	66
<i>In re</i> estate of Logan.....	148
<i>In re</i> Jacobs.....	583
<i>In re</i> Larson.....	364
<i>In re</i> Mang.....	352
<i>In re</i> Morris et al., admr., v. Matthews..	375
<i>In re</i> petition of Allen.....	274
<i>In re</i> petition of Baily, recr.....	11
<i>In re</i> petition of Hearn.....	365
<i>In re</i> petition of Mehrbach.....	465
<i>In re</i> petition of the U. S.....	329
<i>In re</i> petition of Underhill.....	282
<i>In re</i> probate will of Cottrell.....	2
<i>In re</i> probate will of Darrow.....	51
<i>In re</i> probate will of Ellick.....	231
<i>In re</i> probate will of O'Hara.....	87
<i>In re</i> probate will of Phelps.....	293
<i>In re</i> probate will of Russell.....	435
<i>In re</i> probate will of Smith.....	220
<i>In re</i> settlement of accounts of Hutchin- son, exrx.....	268

	PAGE
<i>In re</i> The Commonwealth Fire Ins. Co..	57
<i>In re</i> The Union Ferry Co.....	101
<i>In re</i> will of Chase.....	409
<i>In re</i> will of Chauncey.....	457
<i>In re</i> will of Smith.....	252
<i>In re</i> Wood et al. ....	344

## J

Jackson, recr. v. The St. Paul F. & M. Ins. Co.....	485
Jencks v. Van Brunt.....	278
Jewett v. Swann et al.....	144
Jobe v. Davidson... ..	193
Johnson v. Frew.....	395
Johnson et al. v. Meeker, exrx., et al....	158
Jones v. Zoller et al.....	287
Judd et al. v. Buskin .....	123
Jung v. May.....	140

## K

Kedian et al. v. Hoyt.....	406
Kelley v. Burroughs.....	478
Kelly et al. v. Geer.....	279
Kelly v. McMahon ..	223
Kennedy, admr., v. The Manhattan RR. Co.....	549
Kent v. Popham, exrx., impld.....	241
Keogh et al. v. Main et al.....	388
Kimball et al. v. Mapes et al.....	481
King v. The Trustees of St. Patrick's Cathedral, impld.....	501
Kingman v. Frank et al.....	554
Kinnan, exrx., v. Guernsey, exr., et al... ..	410
Knapp, recr., v. McGowan et al.....	182
Knapp v. Simon, impld.....	250
Knapp v. The Northwestern Mut. Life Ins. Co.....	285
Knowles v. Toone, impld... ..	522
Kohn v. Koehler... ..	363
Krower et al., exrs., v. Reynolds.....	383
Krumm v. Beach et al.....	541
Kruse v. Dusenbury et al... ..	201

## L

Lake v. The N. Y. C. & H. R. RR. Co..	289
Lane, exrx., v. Lane.....	81
Lawrence, by guardian, v. Cooke. ....	257
Learned v. Tillotson.....	545
Lenhart, admr., v. The N. Y., L. E. & W. RR. Co .....	17
Leonard v. Kingaland.....	473
Lewis v. The State.....	114
Lichtenberg v. Herdfelder et al.....	334

	PAGE
Lippincott v. Westray.....	102
Lippman et al. v. Shapiro.....	504
Lithauer, assignee, v. Taggart et al.....	421
Loeffler v. Brestenstein.....	444
Loveridge v. Hill et al.....	175
Lowery et al. v. Clinton et al.....	191
Lyman et al. v. Bowe, sheriff.....	22
Lyon et al., exrs., v. Hersey et al.....	100

## M

McAlear v. Delaney et al.....	252
McCarthy v. The Mayor, &c., of N. Y. ....	134
McDonald v. The Mayor, &c., of N. Y. ....	513
Mack v. Austin, exr.....	6
McKeon et al., exrs., v. Fish, recr.....	402
McLaren v. Percival et al.....	171
McLean v. McLean.....	864
Mahon v. Mahon.....	346
Mallock v. Robinson.....	229
Mallory v. Reichert.....	19
Manley v. Taylor.....	386
Mapes, treasr., v. The American Home Missionary Society, impld.....	493
Masterson v. Cranitch.....	55
Matthews v. Shaffer et al.....	456
Mayer et al. v. Ehrlich et al.....	376
Mead, trustee, v. Riley.....	340
Mellesy v. Kahn et al.....	339
Miller v. Hart.....	168
Miller v. Mackenzie et al, admsr.....	109
Miller v. Miller, exrx., et al.....	145
Mores, assignee, v. The Society for the Protection of Destitute Roman Catho- lic Children.....	247
Morgan v. The City of Binghamton et al.....	228
Morrill v. The C. T. Segar Mfg. Co....	233
Morris et al. v. Morris.....	188
Morris et al. v. Talcott.....	159
Mullen, by guardian, v. Christian et al..	426
Muller v. The City of Newburgh.....	550
Murphy, by guardian, v. Mairs.....	492
Murphy, by guardian, v. Orr et al.....	110
Murphy, admr., v. The N.Y., L. E. & W. RR. Co.....	414
Murray v. The New York Life Ins. Co..	567
Muser et al. v. Lewis, impld.....	450
Muzzey v. Cable.....	142
Myers, sheriff, v. Becker.....	39

## N

Naylor v. Lane.....	50
Naylor v. Naylor.....	79
Near, admr., v. The D. & H. C. Co....	303
Neu, by guardian, v. McKechnie et al....	132

	PAGE
Newcomb, recr., v. Almy.....	260
Newman v. The Third Ave. RR. Co....	500
Nichols v. McLean.....	96
Nixon et al., exrs., v. Stanley.....	451
Norton v. Yerdon.....	296

## O

O'Brien, sheriff, v. Young et al.....	86
Odell et al. v. Odell et al.....	13
O'Hara et al. v. Dudley et al., exrs.....	87
Olsen v. Clyde.....	430
O'Meara v. French.....	466
O'Reilly v. The Corporation of the Lon- don Assurance.....	147
Oyer et al. v. Oyer, impld.....	313

## P

Page v. Gilbert et al.....	222
Parsons et al. v. Sprague.....	467
Partridge v. Brown.....	434
Paulitsch v. The N. Y. C. & H. R. RR. Co.....	73
Pfeffele, admr., v. The Second Ave. RR. Co.....	44
Phelan v. Schell.....	49
Platt, assignee, v. Ashman, impld.....	297
Platt, assignee, v. Jones.....	115
Pope et al. v. Porter et al.....	103
Power et al., admsr., v. The N.Y., L. E. & W. RR. Co.....	408
Powers v. Hogan.....	459
Price v. Price.....	427, 557
Price v. Price et al.....	331
Prior v. White et al.....	70
Purdy v. The Rochester Printing Co....	253
Putnam et al. v. Griffin.....	46

## R

Rafferty v. Williams et al.....	341
Ramsey v. Wandell et al., admsr.....	146
Reed v. The Mayor, &c., of N. Y.....	580
Riggs, admr., v. The American Tract Soc.	37
Riley v. Schoeffel, sheriff, et al.....	438
Riley v. Sexton et al., impld.....	308
Riley v. The Mayor, &c., of N.Y.....	391
Ripley et al., overseers, v. Little.....	165
Ripley et al., overseers, v. McCann.....	123
Roach et al. v. Duckworth.....	185
Robinson v. Robinson.....	188
Robinson v. The National Bk of New Berne.....	113
Roblee et al. v. Gallentine, impld.....	153
Rodgers, overseer, v. Coyle et al.....	120

# TABLE OF CASES DIGESTED.

vii

	PAGE
Ryckman v. Ryckman.....	41
Ryer v. Ryer.....	358

## S

Salter, recr., v. Bowe, sheriff.....	292
Schell v. Cockroft.....	377
Schmidt v. Cowperwaite et al.....	68
Schneider v. Quosbarth.....	527
Schulz v. Harris, impled.....	54
Schuster et al. v. The Dutchess Co. Mut. Ins. Co.....	187
Schwandner, admr., v. Birge et al.....	431
Serat v. The Utica, I. & E. RR. Co.....	196
Scott v. Montello.....	462
Seybolt, admrx., v. The N. Y., L. E. & W. RR. Co.....	188
Seymour v. Alden.....	78
Sherwood v. Pierce.....	508
Shipman, exr., v. Rollins et al.....	370
Sibley et al. v. Killom et al., exrs.....	190
Siewert v. Hamel.....	407
Silberman et al. v. Clark et al.....	538
Simmons v. Simmons.....	234
Simonton et al. v. Hays et al.....	56
Smith et al., admsrs., v. Kibbie.....	118
Smith v. Newell.....	225
Smith, exrx., v. Rice.....	16
Smith, exrx., v. The N. Y. C. & H. R. RR. Co.....	230
Smither v. Bissell et al.....	264
Snyder v. Bliss et al.....	304
Snyder v. Snyder et al., exrs.....	163
Sonneborn v. Libby et al.....	469
Spencer v. Spencer, admrx.....	32
Spies v. Roberts.....	505
Spinney v. Thurber et al.....	575
Stanford, assignee, v. Lockwood et al.....	155
Stebbins v. Breese.....	261
Stephens v. Cornell.....	306
Stern v. Moss.....	528
Stokes v. Pease.....	810
Stokes v. Stickney et al.....	251
Story v. The Williamsburg Masonic Mutual Benefit Assn.....	4
Strohm v. The N. Y., L. E. & W. RR. Co.....	314
Strong v. Strong.....	491
Struthers v. Hoffstadt et al.....	242
Sturges v. Wiltzie.....	266
Burdam et al., comrs., v. Fuller, comr.....	65

## T

Taylor v. Meldrum, sheriff.....	25
Teall v. The City of Syracuse.....	400
The Agricultural Ins. Co. v. Barnard, impled.....	562

The American Tool Co. v. Smith.....	52
The Atty.-Gen. v. The Continental Life Ins. Co. Claim of Gray.....	448
The Atty.-Gen. v. The Continental Life Ins. Co. Claim of Wingate.....	385
The Board of Corrections & Charities v. Hammillet et al.....	494
The Board of Education District School No. 2 v. The Board of Education District School No. 29.....	449
The City Nat'l Bank of Dallas v. The Nat'l Park Bank.....	166
The Davenport Glucose Co. v. Taussig et al.....	328
The Emigrants' Industrial Savings Bank v. Clute, impled.....	332
The Fire Dept. of N. Y. v. Sturtevant et al.....	548
The Manufacturers' Nat'l Bank v. Rober et al.....	476
The Mayor, &c., of N. Y. v. Buell.....	446
The Mayor, &c., of N. Y. v. Hart et al.....	283
The Mayor, &c., of N. Y. v. Miller.....	496
The Mechanical Orguinette Co. v. Haynes et al.....	535
The Metropolitan Nat'l Bank v. Sirret, impled.....	143
The Orden Germania v. Devender.....	480
The People v. Baker.....	316
The People v. Bork.....	281
The People v. Casey.....	191
The People v. Conroy.....	488
The People v. D'Argencour.....	135
The People v. Gunn et al.....	275
The People v. Hooghkirk, impled.....	322
The People v. Irving.....	7
The People v. Jefferson.....	217
The People v. Muller.....	256, 530
The People v. Norton.....	381
The People v. Persons.....	106
The People v. Raymond.....	137
The People v. Swales et al.....	445
The People v. The City Bk. of Rochester.....	119
The People v. The Equitable Trust Co. of New London.....	537
The People v. The Genesee Valley RR. Co. et al.....	81
The People v. The Globe Mut. Life Ins. Co. Claim of Oesterle.....	197
The People v. The Gold & Stock Tel. Co.....	218
The People v. The Knickerbocker Ice Co.....	194
The People v. The Mutual Trust Co.....	116
The People v. Whedon.....	384
The People ex rel. Augerstein et al. v. Kinney et al.....	398
The People ex rel. Burch v. Mills.....	284



	PAGE
The People ex rel. Burhans et al., Suprs., v. The Board of Supervisors of Ulster Co.....	208, 272
The People ex rel. Cashman v. Heddon et al., referees.....	173
The People ex rel. Chamberlain v. For- rest et al.....	516
The People ex rel. Devoe v. Kelly, sheriff,	205
The People ex rel. Dickel v. The Com- missioners of Docks.....	552
The People ex rel. Dowdney v. Thomp- son, Comr.....	455
The People ex rel. Dumahaut v. Fire Comrs.....	387
The People ex rel. Evans v. McEwen, supt.....	196
The People ex rel. Jessup v. Kelly et al..	569
The People ex rel. Johnson v. The Prest., &c., of Whitney's Point.....	301
The People ex rel. Lawrence v. Mann et al.	290
The People ex rel. McDonald v. Keeler, sheriff.....	198
The People ex rel. McDonough v. The Managers of the Buffalo Asylum for the Insane.....	276
The People ex rel. Masterton v. Fire Comrs.....	277
The People ex rel. Morgan et al. v. The Surrogate of N. Y. ....	138
The People ex rel. Nubell v. Byrnes et al.	357
The People ex rel. Scherer v. Walsh....	511
The People ex rel. Short et al. v. Bacon, sheriff.....	129
The People ex rel. The 23d St. RR. Co. v. Comrs of Taxes.....	84
The People ex rel. Townshend v. Cady..	498
The Phoenix Foundry & Mach. Co. v. The North River Construction Co....	489
The Pratt Mfg. Co. v. The Jordan Iron & Chem. Co.....	378
The Remington Paper Co. v. O'Dough- erty.....	53
The Rome Savings Bank v. Kramer et al.	337
The Seneca Nation of Indians v. Hawley.	76
The Shepherd's Fold v. The Mayor, &c., of N. Y.....	299
The Toronto Gen. Trust Co., trustee, v. The C., B. & Q. RR. Co.....	42
The Union Nat'l Bank of Rahway v. Un- derhill, impled.....	404
The Utica Waterworks Co. v. The City of Utica.....	14
The Village of Port Jervis v. The First Nat'l Bank of Port Jervis.....	565

	PAGE
The West Troy Waterworks Co. v. The Village of Green Island.....	207
Thomas et al., exrs., v. Bogert et al....	396
Thomas v. Kingsland et al.....	71
Thomas, exrx., v. The N. Y. Life Ins. Co.	335
Thomas v. Williams.....	285
Thompson v. The N. Y. C. & H. R. RR. Co.	347
Tiers v. Tiers, exr., et al.....	243
Tolan v. Carr.....	484
Townshend v. Williams.....	502

## V

Van Arnam v. McCune, prest.....	412
Vanderzee et al. v. Slingerland et al....	107
Van Schaack v. Sanders, impled .....	170
Vatable et al. v. The N. Y., L. E. & W. RR. Co.....	178
Vickers v. Moore.....	370

## W

Wager et al. v. Wager, impled ..	318
Waldo v. Waldo et al.....	100
Wallace v. Wallace.....	495
Walsh v. Schulz.....	460
Walsh v. The Trustees of the N. Y. & Brooklyn Bridge Co.....	547
Warner, assignee, v. Jaffray et al.....	388
Watts v. Nichols et al .....	165
Welch v. Platt.....	265
Westerfield et al. v. Radde et al.....	448
Wheeler v. Dunning et al.....	380
Whitely v. Zea.....	98
Whitfield et al. v. Whitfield et al.....	386
Whitney et al. v. The N. Y. & Atlantic RR. Co.....	236
Whitney et al. v. The State... ..	323
Williams v. Burton et al., impled.....	399
Wilmore v. Flack et al., exrs.....	523
Wilson v. Munnoz, admrx.....	75
Wilson v. The N. Y. C. & H. R. RR. Co.	561
Wood v. Holmes, exrx.....	121
Wood v. Rabe, exr., et al.....	558
Woodward et al. v. Frost et al....	125
Woolsey v. Morris et al.....	390
Wyckoff v. Andrews, impled..	356

## Y

York v. The People.....	104
Youmans v. Terry.....	269

## Z

Zimmer v. Settle et al.....	245
-----------------------------	-----

# TABLE OF CASES REPORTED

IN THE

FIRST NINETEEN VOLUMES WHICH HAVE BEEN ACTED  
UPON BY APPELLATE COURTS.

	PAGE		PAGE
Adair v. Brimmer, XV, 421, reversed, .....XIX,	59	Douglas v. Haberstro, XVIII, 147, af- firmed May 6, 1884. No opinion.	
Althouse v. Sharp, XIII, 478, affirmed June 24, 1884. No opinion.		Duff v. Hutchinson, XIX, 23, appeal dismissed June 27, 1884. No opinion.	
Baird v. The Mayor, &c., of N. Y., XVIII, 39, reversed Oct. 7, 1884.		Ellis v. The Phoenix Nat'l Bank, XVII, 475, affirmed..... XIX,	188
Bamber v. The City of Rochester, XIV, 470, affirmed Oct. 21, 1884.		Erkenbrach v. Erkenbrach, XVIII, 444, affirmed Oct. 7, 1884.	
Bolt v. Keyhoe, XVIII, 88, affirmed June 17, 1884. No opinion.		Finley v. Fay, VIII, 49, reversed .XIX,	362
Bradley v. Manning, XII, 497, affirmed June 24, 1884. No opinion.		Flack v. The State, XVI, 414, affirmed, .....XIX,	88
Bullard v. Benson, XVIII, 206, modified, .....XIX,	539	Freeman v. Coit, XV, 142, affirmed, XIX,	161
Callahan v. Sharp, XVI, 505, affirmed April 15, 1884. No opinion.		Glasing v. Sharp, XIV, 167, affirmed, .....XIX,	517
Catlin v. Catlin, XVIII, 442, modified Oct. 21, 1884.		Granger v. Craig, XVI, 244, affirmed June 17, 1884. No opinion.	
Chase v. Chase, XVII, 457, reversed, XIX,	89	Grow v. Garlock, XV, 259, reversed, .....XIX,	518
Clark v. Davenport, XVII, 184, affirmed, ..... XIX,	6	Haight v. Brisbin, XVI, 187, affirmed, .....XIX,	154
Clark v. Mackin, XVIII, 250, modified, ..... XIX,	8	Hall v. The U. S. Reflector Co., XVIII, 504, affirmed May 6, 1884. No opinion.	
Coe v. Bearup, XIV, 246, affirmed Oct. 7, 1884.		Harpending v. Arnot, XVI, 392, affirmed, .....XIX,	418
Cooper v. Jolly, XVII, 571, affirmed June 27, 1884. No opinion.		Hayward v. Conkling, XIV, 236, affirm- ed June 27, 1884. No opinion.	
Crouse v. Frothingham, XV, 219, re- versed Oct. 21, 1884.		Hein v. Davidson, XVIII, 381, reversed, .....XIX,	176
Crowe v. Lewin, XVI, 550, affirmed, XIX,	35	Hepburn v. Montgomery, XIX, 26, modi- fied..... XIX,	560
Dewey v. Finn, XVIII, 538, affirmed June 24, 1884. No opinion.		Hobson v. Hale, XVII, 235, affirmed, .....XIX,	218
Dillon v. The Sixth Ave. RR. Co., XIV, 517, affirmed Oct. 28, 1884.		Huntington v. Asher, XIV, 264, reversed, .....XIX,	519

	PAGE		PAGE
Hussner v. The Brooklyn City RR. Co., XVIII, 217, affirmed.....	XIX, 111	Reed v. The Mayor, &c., of N. Y., XVIII, 212, reversed Oct. 7, 1884.	
<i>In re</i> accounting of Consalus, XIV, 92, affirmed.....	XIX, 1	Riggs v. The American Tract Soc., XVI, 391, affirmed.....	XIX, 37
<i>In re</i> Allen, XVI, 282, affirmed....	XIX, 274	Riley v. The Mayor, &c., of N. Y., XV, 271, affirmed.....	XIX, 391
<i>In re</i> estate of Waldron, XVI, 28, reversed.....	XIX, 85	Roeber v. Bowe, XVIII, 14, affirmed May 6, 1884. No opinion.	
<i>In re</i> will of Cottrell, XVIII, 167, affirmed.....	XIX, 2	Seybolt v. The N. Y., L. E. & W. RR. Co., XVIII, 405, affirmed.....	XIX, 133
Jewett v. Pickersgill, XIV, 200, appeal dismissed June 17, 1884. No opinion.		Snyder v. Snyder, XVII, 395, reversed.....	XIX, 163
Johnson v. The N. Y., Ont. & W. RR. Co., XVII, 280, affirmed Oct. 21, 1884.		Solomon v. The City of Kingston, XII, 303, affirmed June 24, 1884. No opinion.	
Johnson v. Williams, XVI, 196, affirmed April 15, 1884. No opinion.		Solomon v. The Manhattan R. Co., XVIII, 9, appeal dismissed April 15, 1884. No opinion.	
Knowles v. Toone, XIV, 432, reversed.....	XIX, 522	Speiss v. Rosswog, XIV, 199, affirmed June 24, 1884. No opinion.	
Larned v. Tillotson, XIV, 62, affirmed.....	XIX, 545	Stanford v. Lockwood, XVI, 312, reversed.....	XIX, 155
Logan v. The O. & L. C. RR. Co., XIII, 335, affirmed June 27, 1884. No opinion.		Story v. The Williamsburgh Mut. Ben. Assn., XVI, 473, affirmed.....	XIX, 4
Loveridge v. Hill, XV, 190, reversed.....	XIX, 175	Stroker v. Elting, XV, 203, affirmed Oct. 21, 1884.	
Mack v. Austin, XVII, 296, affirmed.....	XIX, 6	The American Tool Co. v. Smith, XIX, 52, affirmed June 27, 1884. No opinion.	
McLean v. McLean, XV, 181, reversed.....	XIX, 364	The Att'y Gen. v. The Continental Life Ins. Co., XIX, 81, affirmed June 27, 1884. No opinion.	
Meyers v. Becker, XVII, 88, affirmed.....	XIX, 39	The Buffalo Lubricating Oil Co. v. Everest, XVIII, 106, affirmed April 22, 1884. No opinion.	
Morris v. Talcott, XVII, 237, reversed.....	XIX, 159	The First National Bank of Oswego v. Dun, XVII, 407, reversed Oct. 28, 1884.	
Murray v. The N. Y. Life Ins. Co., XVIII, 252, affirmed.....	XIX, 567	The National Bank of Rondout v. Dreyfus, XIV, 160, affirmed Oct. 7, 1884.	
Nicholas v. The N. Y. C. & H. R. RR. Co., XVIII, 92, affirmed June 3, 1884. No opinion.		The People v. Conroy, XIX, 488, affirmed Oct. 14, 1884.	
Nottingham v. Clark, XIV, 333, affirmed Oct. 7, 1884.		The People v. D'Argencour, XVIII, 532, affirmed.....	XIX, 135
O'Hara v. Dudley, XVII, 269, reversed.....	XIX, 87	The People v. Gunn, XVII, 533, affirmed.....	XIX, 275
Pakalinsky v. The N. Y. C. & H. R. RR. Co., XVIII, 44, affirmed June 10, 1884. No opinion.		The People v. Irving, XVIII, 335, affirmed.....	XIX, 7
Phillips v. Wortendyke, XVIII, 376, appeal dismissed April 22, 1884. No opinion.		The People v. McKeon, XVIII, 571, affirmed Oct. 21, 1884.	
Platz v. The City of Cohoes, XIV, 61, affirmed Oct. 28, 1884.		The People v. Muller, XIX, 256, affirmed.....	XIX, 530
Prentiss v. Cornell, XVIII, 464, affirmed June 27, 1884. No opinion.		The People v. Peck, XVIII, 527, affirmed June 24, 1884. No opinion.	
Purdy v. The Rochester Printing Co., XIII, 419, reversed.....	XIX, 253	The People v. Raymond, XVIII, 537, affirmed.....	XIX, 137
Read v. Lozier, XVIII, 810, appeal dismissed June 17, 1884. No opinion.			

# TABLE OF CASES AFFIRMED, &c.

xi

	PAGE		PAGE
The People v. The Globe Mut. Life Ins. Co., XIX, 197, affirmed June 27, 1884 No opinion.		The Toronto General Trust Co. v. The C., B. & Q. RR. Co., XIX, 42, affirmed June 27, 1884. No opinion.	
The People v. The Knickerbocker Life Ins. Co., XVIII, 492, appeal dismissed June 27, 1884. No opinion.		Tunstall v. Winton, XVIII, 512, affirmed June 24, 1884. No opinion.	
The People ex rel. Chamberlain v. Forrest, XVII, 397, affirmed.....XIX, 516		Wager v. Wager, XVI, 460, reversed, .....XIX, 818	
The People ex rel. The Mills Waterworks Co. v. Forrest, XVII, 330, affirmed Oct. 21, 1884.		Warner v. Jaffray, XVIII, 47, affirmed, .....XIX, 888	
The Remington Paper Co. v. O'Dougherty, XVIII, 190, affirmed June 27, 1884. No opinion.		Wilmore v. Flack, XVI, 236, reversed, .....XIX, 523	
The Shepherd's Fold v. The Mayor, &c., of N. Y., XIII, 572, reversed....XIX, 209		Wilson v. The N. Y. C. & H.R. RR. Co., XV, 7, affirmed.....XIX, 561	
		Woolsey v. Morris, XIII, 492, affirmed, .....XIX, 390	





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VOLUME XIX.

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EXECUTORS. USURY.

N. Y. COURT OF APPEALS.

*In re* accounting of Consalus,  
exr.

Decided March 21, 1884.

An usurious agreement made subsequent to the original loan cannot affect it, but simply avoids the notes given under said agreement.

On accounting by an executor he claimed that a note held by the estate against himself was usurious and void. It was found that the original loan was valid, but that subsequently an agreement was entered into by which 10 per cent. interest was to be paid and that such payments were made. *Held*, That this did not invalidate the original loan; that the claim, therefore, was a just claim against the executor, and that he was properly charged therewith.

Affirming 8. C., 14 W. Dig., 92.

C. was nominated in the will of H. as her executor, and letters testamentary were issued to him in July, 1876. One W., a legatee named in the will, in January, 1880, filed a petition with the sur-

rogate to compel the executor to account and pay his legacy. A citation was served on the executor and he appeared before the surrogate and filed his account, in which he charged himself with a note of \$8,000, as follows: "Note of John Consalus (the executor), which is claimed to be illegal and void, and nothing due thereon, \$8,000," and he credited himself: "Note of John Consalus, claimed to be void by usury, \$8,000." W. filed objections to the account, among which was one to the credit of \$8,000. On a hearing before the surrogate W.'s counsel put in evidence a note dated August 15, 1874, for \$8,000, payable two years after date, with interest semi-annually. On its back were three indorsements of \$400 each, for semi-annual interest, dated respectively February 15, 1875, August 17, 1875, and February 18, 1876, and he asked that the note with un-

paid interest be charged to the executor and credited to the estate in the account. The executor then produced his brother as a witness, and he swore that he and the executor were partners in the business in 1867, 1868, and 1869, and that previous to February, 1869, the firm had about \$6,000 belonging to H., which about the 15th of that month was increased to \$8,000, and a note given to H. for that amount, payable in one year from date, signed by the witness, his brother, and their father as surety; that the firm agreed to pay H. the same rate of interest they had paid her—ten per cent.—and that rate was thereafter paid. On the back of the note there were indorsements of semi-annual interest at the rate of ten per cent., except the first one, dated February 15, 1870, “\$400 in full for interest to that date.” It was proved that the note first put in evidence was given in lieu of the one mentioned in the executor's account, and that on February 17, 1868, a copy of an interest account was furnished H., in which she was credited with interest on \$6,000 from December 21, 1867, to February 15, 1868, at the rate of 10 per cent., and from February 5th to February 15, 1868, on \$2,000, at 10 per cent. It appeared that on February 15, 1870, \$3,000 of the principal was paid on the earlier note, and that on August 15, 1871, H. re-loaned to C. \$3,000 at 10 per cent., and thereafter the note was permitted to stand, and again represented \$8,000. There was no direct evidence as to the terms upon

which the loan of \$6,000 was made. The surrogate found that the re-loan of \$3,000 was upon a usurious agreement, and held that C. was not bound to pay that, but that he was bound to pay the balance of the original loan, which was less than the \$6,000, with interest at 7 per cent. to January 1, 1880, and at 6 per cent. thereafter, and the payments in excess of the legal rate of interest were credited.

*Henry A. Merritt*, for applt.

*Esek Cowen*, for resp't.

*Held*, No error; that the finding was sustained by the evidence; that any usurious agreement made subsequent to the original loan cannot affect it, but simply avoids the notes which were subsequently given. The claim was, within section 13, 2 R. S., 84, a just claim against the executor, which should be regarded as so much money in his hands.

Judgment of General Term, affirming decree of surrogate, affirmed.

Opinion by *Earl, J.* All concur.

## WILLS. PROBATE.

### N. Y. COURT OF APPEALS.

*In re* probate will of Cottrell, dec'd.

Decided March 21, 1884.

The due execution of a will may be proved by competent evidence even against the positive testimony of the subscribing witnesses.

The witnesses denied that they signed the attestation clause, which was in regular form. The will was found among testator's papers, where he had during his last sick-

ness stated it to be. The signatures of the witnesses were proved by comparison to be genuine, and a prior will duly cancelled was produced. *Held*, Sufficient to authorize a finding that the will was properly executed.

In appeals from surrogate's courts in cases commenced prior to September 1, 1880, the Court of Appeals is precluded by §1887, Code Civ. Pro., from re-examining the conclusions of fact except where the General Term has reversed on such questions and so certifies.

Affirming S. C., 18 W. Dig., 167.

Upon the presentation of the will of C. for probate the two persons purporting to have signed it as subscribing witnesses each testified that none of the formalities required by the statute were complied with in its execution in their presence, and positively denied that either of them was present at its execution or signed the attestation clause. It was proved that the testator boarded and lodged with the alleged subscribing witnesses, who were husband and wife, both at the time said will purported to have been executed, which was about three years prior to the death of the testator, and for several years prior thereto; that the husband had been a subscribing witness to a will previously executed by C., and that the will in dispute, apparently properly executed, was found among C.'s papers after his death. It also appeared that the will and the attestation clause were in the handwriting of C., and that the will bore his signature at the end thereof. C. declared during his last sickness that the will, executed as he had described it, was either among his papers or that he had given it to his executor. A bag containing

the testator's papers, among which was the will in question, was produced by the executor at a meeting of the testator's relatives, including the contestants, held at the executor's house on the day of the testator's death, and its contents were then made known to the parties interested. On the trial specimens of the handwriting of each of the witnesses were put in evidence, and from a comparison of such specimens with their signatures to the attestation clause experts testified that such signatures were respectively in the genuine handwriting of such witnesses. It appeared that the testator was a bachelor about fifty years old, and worth about \$12,000; that he had been for some time afflicted with a disease from which his death within a short time might reasonably have been anticipated. The will in question was the second made within five years. The prior will, duly cancelled, was put in evidence and proved to have been executed in accordance with the forms prescribed by the statute. The surrogate found as a fact that the subscribing witnesses to the will in fact signed the attestation clause, and he decided that the will was properly executed by the testator and the witnesses.

*James Lansing*, for applts.

*Robert H. McClellan*, for resp't.

*Held*, No error; that the circumstances, taken in connection with the full and regular attestation clause in the handwriting of the testator, proved to have been signed by the witnesses, were suffi-

cient to authorize the finding of the surrogate.

If it was established by competent evidence that the subscribing witnesses were mistaken as to the fact of acting as witnesses to the execution of the will, it would follow that they were also mistaken in their testimony as to the several particulars occurring at the time of such signing. 2 Bradf., 236.

Under § 2620 of the Code of Civil Procedure the due execution of a will may be established by competent evidence, even against the positive testimony of the subscribing witnesses thereto, which section formulates the rule established by the authorities. 25 N. Y., 425; 83 id., 594; 11 id., 224; 2 Barb. Ch., 59; 10 Paige, 91; 24 N. Y., 52.

A full attestation clause regularly authenticated is entitled to great weight in the determination of the question of fact involved. 3 Curteis, 547; 24 N. Y., 55.

Chaffee v. Bap. Miss. Con., 10 Paige, 85; Rutherford v. Rutherford, 1 Den., 33; *In re* will of Kellum, 52 N. Y., 517; Lewis v. Lewis, 11 id., 220; Wooley v. Wooley, 18 W. Dig., 574, distinguished.

The determination of the question of fact involved in the inquiry whether a will has been properly executed or not is governed by the same rules of law which control in the trial of other questions of fact. The proponent has the affirmative of the issue, and if he fails to convince the trial court by satisfactory evidence that each and every

condition required to make a good execution of the will has been complied with, he will fail in establishing such will.

In reviewing questions arising on appeal from Surrogates' Courts, in cases commenced prior to September 1, 1880, this Court is precluded by section 1337 of the Code of Civil Procedure from re-examining the conclusions of fact reached by the Court below, except in cases where the Supreme Court has reversed their judgments upon such questions and so certify in their order of reversal. § 1338; 87 N. Y., 514, 623. In these, as in other appeals, this Court may look into the evidence given on the trial only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the trial court, and if there is such evidence this Court is concluded thereby.

Judgment of General Term, affirming decree of surrogate, affirmed.

Opinion by *Ruger, Ch. J.* All concur, except *Rapallo, J.*, not voting.

## BENEVOLENT SOCIETIES.

### N. Y. COURT OF APPEALS.

Story, *respt.*, v. The Williamsburgh Masonic Mut. Benefit Assn., *applt.*

Decided April 15, 1884.

Plaintiff was the designated beneficiary as the wife of S. in a certificate issued by defendant. In an action to recover upon the same it was claimed that S. was previously married in England and that such marriage remained in force until his death. *Held*, That

the certificate operated as an assent by defendant to plaintiff's appointment as beneficiary and entitled her on the death of S., in the absence of any other appointment, to demand and receive the fund.

A by-law prescribing the duty of the association to pay to the lawful widow of a deceased member does not prevent it from recognizing as a beneficiary one designated by the member as holding the relation to him of wife.

Affirming S. C., 16 W. Dig., 478.

This action was brought by plaintiff as the widow of S. to recover \$1,025 of defendant by reason of S.'s membership in said corporation at the time of his death. It was conceded that S. became a member of the defendant in 1870 and so continued until his death. During that period he lived with plaintiff as his wife, and had done so since their marriage in 1854, the plaintiff believing herself to be his lawful wife and having had several children by him. Defendant's constitution declares its object to be to provide for the relief of widows, orphans and heirs of deceased members. Its by-laws declare that within sixty days after the death of a member, its board of directors shall cause to be "paid over to his widow, and if no widow, then to his children or their legal custodian, and if no children, then to the person or persons (herein provided for) entitled to receive the same, as many dollars as there were members who paid the last assessment." In June, 1878, defendant issued to S. a certificate that he was a member of the association and that in accordance with the requirements of the "By-laws and articles of corporation," his wife, naming the plaintiff, was

designated as his beneficiary of all funds due and payable by the association in case of his death. This certificate was executed by the president, secretary and treasurer of defendant under its corporate seal. Plaintiff testified that she knew of the insurance and with one or two exceptions she paid the assessments out of money she had earned, which evidence was not contradicted. Defendant claimed that S. was married to one W. in England in 1852, who is still living and that that marriage remained in full force until the death of S. in 1880, and that it was therefore not liable to plaintiff.

*C. L. Lyon*, for applt.

*J. Stewart Ross*, for resp't.

*Held*, Untenable; that the certificate of June, 1878, operated as an assent by defendant to the appointment of plaintiff as beneficiary of the fund which should become payable on the death of S., and entitled her upon his death, in the absence of any other or different appointment, to demand and receive it.

*Also held*, That while defendant's by-law, which prescribed the obligation and duty of the association on the death of a member, contemplated a payment to a person who should be the lawful widow of a deceased member, this was not such a limitation of the power of defendant as would prevent it from recognizing as a beneficiary one designated by the member as holding the relation to him of wife.

*Also held*, That the non-disclosure by S. of his prior marriage



was not a fraud on defendant, its obligation was not enlarged by making plaintiff the beneficiary, nor did the appropriation of the fund for her benefit contravene the policy or objects of the association.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur.

### MARRIED WOMEN. MORTGAGE.

#### N. Y. COURT OF APPEALS.

*Mack, applt., v. Austin, exr., respt.*

Decided April 15, 1884.

In the absence of a bond or an express covenant in the mortgage to pay, there is no personal liability for a deficiency, and the remedy of the mortgagee is confined to the mortgaged premises. No such covenant can be inferred or implied from a clause in a married woman's mortgage charging her separate estate.

Affirming S. C., 17 W. Dig., 296.

This action was brought to recover a deficiency resulting from the foreclosure of a mortgage executed by defendant's testatrix, and is founded upon the mortgage alone, which was not accompanied by a bond. The complainant set out the mortgage in full. After the grant of the land described, the mortgage declares, "this grant is intended as a security for the payment of the sum of twelve hundred dollars, money loaned and advanced to said party of the first part for her benefit and on the credit of her separate estate."

There was no express covenant to pay the sum named in the condition of the mortgage. The complaint averred that the mortgagor had other separate property than that covered by the mortgage.

The complaint was demurred to, as not stating facts sufficient to constitute a cause of action, and the demurrer was sustained.

*Chester M. Elliott, for applt.*

*H. V. Howland, for respt.*

*Held,* No error; that in the absence of an express covenant to pay no personal liability for a deficiency arose, and the remedy of the mortgagee was confined to the lands mentioned in the mortgage. 1 R. S., 689; 2 Mod., 36.

The clause in the mortgage as to charging the mortgagor's separate estate limits the charge to so much thereof as is described in the mortgage, and does not make the mortgagor liable personally and irrespective of such property. 2 Barb. Ch., 559; 15 Hun, 87. A promise to charge herself personally cannot be inferred or implied.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Finch, J.* All concur.

### CLOUD ON TITLE.

#### N. Y. COURT OF APPEALS.

*Clarke, applt., v. Davenport, Comptroller, respt.*

Decided April 15, 1884.

An action to set aside a certificate on a sale for unpaid taxes, as a cloud on title, within a month after the tax sale is premature.

To authorize a court of equity to remove the lien of an assessment as a cloud on title it must appear that the record of proceedings is not void on its face, and that the claimant under it would not by his proofs in an attempt to enforce his claim develop the defect rendering it invalid.

Mere apprehension and groundless fears are not enough to sanction such an action, but it must appear that there is a determination to create the cloud.

Affirming S. C., 17 W. Dig., 184.

This action was brought to set aside a certificate issued by the comptroller upon a sale of lands for taxes, on the ground that the same was irregular and void, and to cancel the same if it had been issued, and if it had not to enjoin the comptroller from issuing the same; and also to enjoin him from executing a deed by virtue of the sale for taxes. Plaintiff claimed that he was entitled to maintain the action because the certificate of sale was a cloud upon his title. The taxes for which the land was sold were irregularly and illegally laid. The action was brought within a month after the sale was made.

*James B. Olney*, for applt.

*Wm. A. Poste*, for resp't.

*Held*, That the action was prematurely brought. To authorize the interposition of the court to remove the lien of an assessment as a cloud upon title, it must appear that the record of proceedings is not void upon its face, and that the claimant under it would not by the proof he would be obliged to produce, in the event of an attempt to enforce his claim, develop the defect rendering it invalid. 81 N. Y., 156; 69 id., 506. An action like the present could

not be maintained unless the certificate was a presumptive lien under the statute. 39 N. Y., 386; 14 id., 9. Mere apprehension and groundless fears are not enough to sanction such an action. It must appear that there is a determination on the part of the defendant to create the cloud. 63 N. Y., 489.

*Scott v. Onderdonk*, 14 N. Y., 16, distinguished.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Miller, J.* All concur.

## ASSAULT. EVIDENCE.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Irving, *applt.*

Decided April 15, 1884.

On a trial for an assault the prisoner, on cross-examination, was asked whether he had assaulted a fellow member of the legislature.

*Held*, That the question was a proper one.

Mere charges or accusations or even indictments against a witness cannot be inquired into for the purpose of discrediting him, but the inquiries must be as to specific facts which tend to discredit him or impeach his moral character.

The prisoner struck complainant on the head with the butt end of a pistol. *Held*, That the description of the pistol by its name in connection with the character of the wound inflicted was sufficient to carry to the jury the question whether it was an instrument likely to produce grievous bodily harm.

Affirming S. C., 18 W. Dig., 335.

The defendant was indicted for assault and battery. The complainant testified that the assault was without provocation and so brutal and causeless as to indicate in complainant either temporary

intoxication or unusual ugliness of temper. His testimony was corroborated by one witness. Defendant testified in his own behalf and he and three of his witnesses swore that the complainant rushed at defendant using abusive language and having a bottle in his hand and that defendant merely laughed and walked away, and that afterwards the complainant and one Mc D. had a fight from which the complainant's injuries might have arisen.

On the cross-examination of defendant questions as to whether he had committed other offenses were put, which were objected to, but the objections were overruled and exceptions taken. All of these inquiries except two were answered in the negative. One of these was as to whether he assaulted a fellow member of the legislature and was expelled from that body. He denied the expulsion but admitted the assault.

*W. Bourke Cockran*, for applt.

*John Vincent*, for respts.

*Held*, That the question was a proper one within the discretion of the trial court; that the assault referred to indicated disregard of the law, contempt for personal rights and an ungovernable temper prompting to a criminal act.

Mere charges or accusations, or even indictments against a witness, may not be inquired into for the purpose of discrediting him, since they are consistent with innocence and may exist without moral delinquency, but the inquiries must be as to specific facts which tend to discredit the witness or impeach

his moral character. 76 N.Y., 288; 72 id. 571; 79 id. 594; 72 id. 393; 94 id. 143, 144.

*Nolan v. Brooklyn City & N. Y. RR. Co*; 87 N. Y. 68, distinguished.

The evidence showed that the defendant struck the complainant twice on the left side of the head with the butt end of a pistol, severely injuring him. The pistol was not produced or otherwise described than by its common name. The question whether the pistol in the hands of defendant was an instrument or thing likely to produce grievous bodily harm was submitted to the jury.

*Held*, No error; that the pistol was capable of being used otherwise than by firing, and the description of it by its name, in connection with the character of the wound inflicted, was sufficient to carry to the jury the question of fact.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Finch, J.* All concur, except *Ruger, Ch.J.*, and *Rapallo, J.*, not voting.

## RECORD. SUBROGATION.

### N. Y. COURT OF APPEALS.

*Clark, applt.*, v. *Mackin et al.*, exrs., *impld.*, *respts.*

Decided March 21, 1884.

The mortgage in suit was assigned after being recorded by S., the mortgagee, to plaintiff's assignor, but the assignments were not recorded, and S. thereafter executed and delivered a satisfaction piece, which was

recorded. Subsequently a mortgage on the same premises was given to R. et al., who had knowledge of the prior mortgage, and they assigned the same for value to defendants, who took without notice and recorded their assignment, which contained a guaranty of payment. *Held*, That plaintiff's mortgage was not entitled to priority as to defendants, but that plaintiff was entitled to redeem defendants' mortgage and to be subrogated to all their rights including the guaranty.

Modifying S. C., 18 W. Dig., 250.

This action was brought to foreclose a mortgage executed by M. to S. and recorded February 1, 1856. On April 30, 1856, S. assigned the mortgage to D., who on January 13, 1880, assigned the same to plaintiff. None of these assignments have ever been recorded. On October 11, 1873, S. executed a satisfaction of said mortgage which was recorded October 17, 1873. On January 22, 1876, McN., having become the owner of the property in question, executed a mortgage thereon to R. and T., which was recorded January 26, 1876. It appeared that R. and T. took this mortgage with notice of the existence of plaintiff's mortgage. They assigned their mortgage on February 1, 1877, to defendants M. and V., as executors, they paying the full amount of the mortgage as consideration. The assignment to them was recorded February 2, 1877, and was taken in good faith, without knowledge of the existence of plaintiff's mortgage. It contained a guaranty of payment by the assignors. Defendants foreclosed their mortgage prior to the commencement of this action and took judgment requiring R. and T. to pay

any deficiency. Plaintiff was not made a party to that action.

*Henry Bacon*, for applt.

*E. A. Brewster*, for respts.

*Held*, That plaintiff's mortgage was not entitled to priority over the mortgage held by defendants M. and V., the assignment to them having been taken without knowledge or notice of plaintiff's mortgage, which had been satisfied of record. 66 N. Y., 77; 87 id., 446. In the hands of a mortgagee who had notice of the existence of plaintiff's mortgage the latter would be entitled to a priority. Plaintiff should not be deprived of this priority because of the assignment to M. and K., and is entitled in equity to redeem the mortgage to R. and T., and to acquire all the rights which passed by virtue of their assignment of the mortgage to M. and V., and the guaranty contained in the same and to be subrogated in their place upon payment of their lien for the mortgage, interest and costs, 82 N. Y., 155; 66 id., 363; 70 id., 553, and a provision should be made in the decree to that effect. The fact that R. and T. are not parties to this action cannot affect this disposition of the case. It is no objection to granting relief to plaintiff by directing an assignment of the mortgage to her that no such relief is demanded in the complaint. Such relief could not affect the rights of R. and T., as they would be at liberty to contest any claim plaintiff might have against them by virtue of the bond and mortgage assigned to M. and V. and

the judgment of foreclosure thereon.

Judgment of General Term, affirming judgment dismissing complaint as to defendants M. and V., modified accordingly.

Opinion by *Miller, J.*; *Rapallo, Earl* and *Finch, JJ.*, concur; *Ruger, Ch. J.*, *Andrews* and *Danforth, JJ.*, for affirmance without modification.

### NEGLIGENCE. CHARGE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles S. Archer, *respt.*, v. The N. Y., N. H. & H. RR. Co., *applt.*

Decided March 7, 1884.

In an action to recover damages for injuries caused by being struck by a railroad train passing a depot-platform upon which plaintiff claimed to have been standing at the time, the court charged the jury as follows: "Now, gentlemen, what the defendant was bound to do, or what it was not bound to do, what precautions it was bound to take, or not to take, I leave to you, under the circumstances of this case, to say in determining the question of negligence. *Held*, Error.

Appeal from judgment recovered on verdict of a jury, and from order denying motion for a new trial.

Plaintiff brought this action to recover damages for injuries sustained by being struck by one of defendant's trains while it was passing the platform of defendant's depot at Hartford, on which plaintiff claimed to have been standing at the time.

The accident took place on the night of October 20th, 1880, and it was proved on the part of defend-

ant that the platform was lighted by a number of lamps; that the headlight of the engine on the approaching train was lighted and illuminated the tracks in front of it, and that the whistle was blown and the bell was rung as the train approached the depot.

The court charged the jury, among other things, as follows:

"Now, gentlemen, what they were bound to do, what precautions they were bound to take or not to take, I leave you, under the circumstances of this case, to say in determining the question of negligence."

*H. H. Anderson*, for *applt.*

*Dennis McMahon*, for *respt.*

*Held*, Error; that by the direction which was given the jury were placed at the largest liberty to consider and determine for themselves whether the railway company should or should not have adopted other precautions than it did to protect itself against the charge of negligence. What such precautions might be supposed to be were in no manner defined by the court; but the jury were left to devise, imagine, or invent them for themselves.

That this was not the province of the jury. 40 N. Y., 9; 58 id., 451; 70 id., 119; 71 id., 228.

Judgment reversed and a new trial ordered.

Opinion by *Daniels, J.*; *Brady, J.*, concurs in the result.

## RECEIVER. COSTS.

## N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* petition of James H. Baily, receiver.

Decided Jan. 25, 1884.

A receiver of a corporation is not entitled to the proceeds of a judgment for costs entered on the dismissal of the complaint in an action brought against the corporation before his appointment, but which was not determined and the judgment entered until afterward.

Such judgment for all ordinary legal purpose is the property of the attorney who defended the action for the corporation.

In January, 1883, one G. commenced an action against the Pelham & Portchester RR. Co. Subsequently appellant was appointed receiver of said company in a judgment creditor's action. After such appointment the action brought by G. came to trial and the complaint was dismissed, and judgment entered in favor of the company for costs; and thereafter such judgment was paid to appellant. Subsequently the attorney of the company in the action brought by G. issued execution against G. for the collection of such judgment; and, thereupon, the receiver applied for an order restraining its collection on the ground that it had already been paid to him. This application resulted in an order directing the receiver to pay over to the attorney the amount of the judgment, and from that order he appealed, claiming that he was entitled to collect the judgment as an asset of the company, and that the attor-

ney must share with the other creditors in a *pro rata* distribution of such assets, and relied upon *Bowling Green Savings Bank v. Todd*, 64 Barb., 146, and *Barnes v. Newcombe*, 11 W.Dig., 505; *id.* 573.

*Wm. E. Walkley*, for applt.

*Harwood R. Pool*, for resp't.

*Held*, That the cases, *supra*, referred only to the rights of ordinary creditors of the corporation and had no relation whatever to the costs of a successful defence recovered by judgment in the name of the corporation. Such a judgment, consisting exclusively of costs, is, for all ordinary legal purposes, the property of the attorney, and its entry is legal notice of the attorney's lien, and such lien cannot be discharged by payment to any one but the attorney, and if the judgment debtor pay it to any other party he does so at his peril. 51 N. Y., 140, 143.

That as between the receiver and the attorney the former had no right to the costs, and he was very properly ordered to refund them to the latter.

Order affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

## WILLS.

## N. Y. COURT OF APPEALS.

*Finley*, admr., *resp't.*, v. *Bent*, exr., et al., *appls.*

Decided March 21, 1884.

Testator bequeathed the residue of his estate to his executors in trust to convert it into personal property, divide it into equal

shares and pay the income of one share to each of his children and the principal in certain proportions at the end of one, three and five years. The will provided that if either child died before the full payment of the whole of his or her share, such share should be paid, &c. *Held*, That the shares of the children vested at once on the death of testator; that the words "full payment" referred to the payment of the instalments, and it was not intended that the bequest should go over if for any reason payment was delayed beyond five years, but only in case the legatee died before any was payable or before full payment could be made.

B., after making in his will certain dispositions of property, devised and bequeathed the residue of his estate to his executors, in trust, among other purposes, to sell and dispose of all his real estate as soon as they conveniently could after his decease, and to divide and dispose of the net proceeds in the manner directed. They were to invest and keep invested \$10,000 for the benefit of his wife, and without delay to divide the remainder into three shares and invest one for each of his three children, S., E. and A. The investments to be bonds and mortgages on real estate or interest bearing securities of the State of New York or the United States, and to pay the income thereof to the child for whose benefit the same was invested. At the end of one year from the testator's death the executors were to pay to each of the children out of the principal of his or her share \$7,000, and at the end of two years after the first payment to pay to each of his children the further sum of \$5,000, and at the end of five years after his decease they were to pay

to each of his children the balance of his or her share. The will provided that if either of the children died before the full payment of the whole of his or her share of such residue" the executors should pay the share of the child so dying, or so much thereof as remained unpaid, "to his or her lawful issue then surviving, and should such child have no lawful issue, then to pay over and divide his or her share then remaining unpaid to and among my children then living and the lawful issue of such of them as may be then deceased, in equal proportions, share and share alike, such issue to receive the same share their parents would have been entitled to if then living." A., the testator's daughter, who was plaintiff's wife, died more than five years after her father intestate, leaving an infant son. At the time of her death a considerable portion of the real estate of the testator had not been converted, and no portion of it had been transferred to her. This action was brought to compel the executors to sell the real estate and to account for and distribute the proceeds and to account for and distribute all other property remaining in their hands unaccounted for and undistributed.

*John W. Boothby*, for appls.

*John H. Clapp*, for respnt.

*Held*, That the interest of A. in the proceeds of the real estate passed to plaintiff, her personal representative; that the direction in the will to the executors to sell the real estate operated as a conversion thereof into personalty,

and for the purposes of the will, and its construction, and the devolution of the estate, it must be treated as personalty from the time of the testator's death; the shares of the children vested at once upon the death of the testator. The words "full payment" must be held to have reference to the payment of the instalments the will required to be made. The language used did not mean that the bequest should go over in case for any reason payment had been delayed beyond the five years, but it was only in case the legatee died before any of it was payable, or after a portion of her share had been paid and before full payment could be made, that it should go over. L. R., 12 Ch. Div., 639; 43 N. Y., 303, 368.

Order of General Term, reversing judgment dismissing complaint, affirmed, and judgment absolute for plaintiff on stipulation.

Opinion by *Earl, J.* All concur.

### PARTITION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Eugene Odell et al., *respts.*, v. Abraham B. Odell et al., *appls.*

Decided Feb., 1884.

Whether a sale shall be ordered before any attempt at actual partition has been made is a question to be determined from all the facts and circumstances of the case.

Where the property in question consisted of farming land with only one set of buildings thereon and the undivided shares of the owners were respectively subject to mort-

gage, *Held*, A proper case in which to decree a sale instead of attempting actual partition.

Appeal by defendants Abraham B. and Charles H. Odell from so much of a judgment of partition as confirms the report of the referee respecting the necessity of a sale of the premises and from so much as directs a sale.

The premises in question consist of a farm of 200 acres, situate in a farming district near the city of Yonkers, upon which there is only one set of buildings. The plaintiff Eugene Odell is the owner of a one-third undivided interest, subject to two mortgages amounting to about \$9,000; Abraham B. Odell owns a one-third undivided interest, subject to two mortgages amounting to \$6,000, and Charles owns a one-third interest, subject to a mortgage of \$3,000 and interest. The other defendants are the respective mortgagees.

The referee found that the whole of the premises are so situated that an actual partition thereof cannot be made without great prejudice to the interests of the parties and that a sale of the whole of the premises is necessary and expedient.

*Held*, No error; that whether a sale shall be ordered in the first instance, or before any attempt has been made at actual partition, is a question to be determined from all the facts and circumstances of the case. The condition of the parties, the location and nature of the property, the market for it as a whole or in separate parcels, the practicability of making



an equitable actual partition; are to be considered in forming a conclusion upon this question.

We do not think, considering all the circumstances, that it would be proper to attempt an actual partition of this property. Each share seems to be already encumbered by mortgages. Only one allotment could have any buildings upon it and the other two would therefore be for a long time without any facilities for a beneficial use as farms. If the parties are unable to keep the premises free from encumbrances now, much less will they be able to put up the necessary buildings for carrying on three farms instead of one, or to pay compensation if necessary to produce equality of partition. Indeed the mortgages upon one share are already in a foreclosure judgment. 65 Barb., 192.

It is a fair conclusion from the evidence that an actual partition cannot equitably or properly be made and that it is for the interest of all the parties to have a sale of the property in such manner as to aggregate the largest amount possible.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P. J.*, concurs; *Dykman, J.*, not sitting.

#### CORPORATIONS. CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Utica Water Works Co.,  
*respt.*, v. The City of Utica, *applt.*

Decided Jan., 1884.

Where the title of an Act of the Legislature expresses a general purpose all matters fairly connected with it are proper to be incorporated in the Act and are germane to its title.

Various terms and conditions of a contract to furnish a city with water by an incorporated company considered.

Appeal from judgment rendered upon decision of the trial at Circuit without a jury.

Action on a contract made in pursuance of "An Act to authorize the Utica Water Works Company to increase its capital stock, and to contract with the Common Council of the City of Utica for a supply of water in said city for the extinguishment of fires." Laws of 1867, Chap. 293. The first section of the act authorizes the making of such contract, and the second section provides that the company may increase its capital stock to a sum not exceeding \$200,000. The contract was made May 19, 1868. The obligation of the company to perform was made dependent on its ability, by November 15th, following, to raise funds sufficient to complete the works mentioned in the contract. The city was to furnish the hydrants and pay for putting them in. For furnishing water for the then settled portion of the city, shown on a map referred to in the contract, the company was to have \$10,000 per annum and one-half of its taxes paid in excess of \$1,000, or if the works should cost less than \$125,000 the charge was to be 7 per cent. on the cost, instead of \$10,000 per annum. The contract further provides: "If said city shall determine to have said

water pipes extended on any street beyond the point designated on said map the said company agree to extend the same to such point as may be designated, the city agreeing to pay, in addition to the sum herein specified, seven per cent. upon the cost of said extension, or new work."

*C. D. Adams*, for applt.

*F. Kernan*, for resp't.

*Held*, That the act embraces but one subject, within the meaning of Section 16 of Article 3 of the Constitution of this State, and that was expressed in its title. 50 N. Y., 533, and cases cited by Church, C. J.

The condition as to raising funds having been duly performed, and the contract having been since recognized as binding and acted under by both parties, their present attitude toward each other is as if the condition had never existed.

It was proper that the city should furnish hydrants, in order to have such as would fit and work properly with their hose and fire apparatus.

The arrangement for future extension was beneficial for the city, and within the power conferred by the act. The contract furnished a mode of computation by which the sum to be paid annually by the city could be ascertained.

The contract does not violate the city charter provision that the council shall contract no debts which shall not be payable within the fiscal year in which it is contracted, and which cannot be discharged from the income of such year.

The effect of the contract is not a remission of taxes, but simply a resort to the amount of taxes as a measure of compensation.

The compensation for extension is seven per cent. of its cost, to be paid annually, in addition to the annual payment specified. The parties did not intend that the extension should be paid for by paying only seven per cent. of its cost; and so the parties have construed it, the city having paid seven per cent. upon the cost of the extension every year since its completion in 1868 to 1882.

It being necessary to take proof to establish the amount of taxes paid by plaintiff, and other *data*, an action, and not *mandamus*, is the proper remedy.

Plaintiff's claim not having been presented to the chief fiscal officer of the city for payment before suit, costs below were refused to plaintiff under § 3245 of the Code. That section does not apply to costs of appeal, and respondent is entitled to costs under subd. 4 of § 3251.

Judgment affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### CONTRACT. MISTAKE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Edward J. Burrowes, *respt.*, v. John M. Peck, *applt.*

Decided Feb., 1884.

An agreement to sell land presupposes title in the seller and cannot be performed by

an assignment of a certificate of sale of the land for taxes.

Where money was paid upon such a contract by a laboring man, who had no knowledge of the requisites of a good title, relying upon a representation that a deed from the comptroller would be the strongest one he could get, *Held*, That he was entitled to recover back the money so paid.

Appeal from judgment in favor of plaintiff.

Action to recover back money paid upon a contract for the sale of land.

The parties entered into an agreement for the sale and purchase of certain land for \$500, whereupon plaintiff asked defendant how they should manage about the deed. Defendant produced certificates for the sale of the land for taxes of 1870, and told plaintiff he would assign them to him and he could get his deed from the Comptroller. On plaintiff's asking if such a deed was all right defendant replied that that "was the strongest deed he could get from anybody." Plaintiff, who was a laboring man and had no knowledge of the requisites of a good title, relied upon the statements made to him and paid \$200 on the contract.

*Held*, That plaintiff was entitled to recover. The receipt given for the money clearly shows that the agreement was to sell the lots. Such an agreement presupposes a title in the seller, and it would not be performed by the assignment of the Comptroller's certificate for the sale of the land for taxes. The money was paid by plaintiff under a mistake of fact caused by the misrepresentation of defendant.

The title which he proposed to give to plaintiff was not a marketable one. Indeed, it was not a title at all; defendant knew this fact, but plaintiff did not.

"Whatever may be the effect of a mistake of law pure and simple, there is no doubt that equitable relief will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced by inequitable conduct of the other party. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of incorrect or misleading statements or acts of the other party. 2 Pom. Eq. Jur., § 847.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

## MORTGAGE. COVENANT.

N. Y. COMMON PLEAS. GENERAL TERM.

Catherine Smith, *exrx.*, *applt.*,  
v. George S. Rice, *respt.*

Decided Jan. 21, 1884.

Where there is no bond and no covenant to pay the mortgage debt, the mortgagor is not personally liable unless the instrument clearly shows such an intent on the part of the contracting parties.

A recital in a purchase money mortgage, there being no bond, that the mortgagor "is justly bound in the sum of \$2000," is not a sufficient admission of such an interest.

Appeal from judgment dismissing complaint.

Action to recover \$2,000 claimed to be due under an alleged covenant in a mortgage. Defendant purchased of plaintiff's intestate certain premises, and took a deed thereof, dated July 31, 1871. Upon the same date he mortgaged said premises to plaintiff's intestate, said mortgage containing the following recital: "Whereas \* \* \* is justly bound to the party of the first part in the sum of \$2,000, to be paid to her on," etc. There was no bond, and the deed contained no express covenant to pay said sum.

The complaint was dismissed.

*Edward C. Ripley*, for applt.

*E. T. Rice*, for respnt.

*Held*, That under 1 R. S., 738, § 139, which provides that "no mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured, and where there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall be given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage," an unqualified admission of indebtedness by the mortgagor is equivalent to an express covenant, and upon such an acknowledgement an action might be maintained. 15 Wend., 15. But an admission of indebtedness must be made in unequivocal terms. The debt must be due from the mortgagor to the mortgagee, and it must be collectable without a foreclosure of the mortgage in order to entitle the mortgagee to a personal judgment

Vol. 19—No. 1b.

against a mortgagor who has given no bond and who has not expressly covenanted to pay the amount for which the mortgage is a security. 2 Barb. Ch., 559; 44 How. Pr., 368; 1 Duer, 405; 15 Hun, 87, 537; 3 N. Y., 264.

In the absence of a bond and of a covenant the burden lies upon the mortgagee of proving that it was the intention of the mortgagor to assume responsibility for the payment of the mortgage debt and thus relieve the mortgagee from the duty of looking to the land for his money. It is evident that the mortgage is a purchase money mortgage, and that the recital that defendant "is justly bound in the sum of \$2,000" to the mortgagee, instead of being an admission of indebtedness, made with a view of adjusting the accounts between himself and the mortgagee, was only an explanation of the reason for giving a mortgage for that amount.

Judgment affirmed, with costs.

Opinion by *Van Hoesen, J.*; *J. F. Daly* and *Beach, JJ.*, concur.

## RAILWAYS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Susan Lenhart*, admrx., *respnt.*, v. *The N. Y., L. E. & W. RR. Co.*, *applt.*

Decided Jan., 1884.

Acts, though entirely proper in themselves in the prosecution of the company's business, may be performed so unnecessarily and carelessly as to constitute negligence on the company's part.

Appeal from judgment on verdict at Circuit, and from order denying motion for new trial.

Action for negligently killing plaintiff's intestate, George Lenhart, at a railway crossing in Buffalo. Intestate was driving his team and loaded wagon. A freight train, with engines at front and rear, passed, and intestate drove forward to cross the track. The rear engine was reversed suddenly and backed without warning, and as it neared the crossing discharged a large volume of steam with loud noise, whereby Lenhart's horses were frightened beyond control, and Lenhart was thrown out and killed. There was a verdict for plaintiff. An exception was taken "to that part of the charge wherein the court leaves it to the jury to find that the accident may have happened through the engine backing *rapidly* to the highway and while Lenhart was approaching the crossing, thus throwing him into a dilemma and leading to a confusion out of which the accident occurred." On that subject, the judge once stated plaintiff's claim to be that "when Lenhart was about to cross the track, after the train had passed, the engine was reversed so quickly and came forward that the team became frightened," and he submitted it to the jury to say whether that was true. Again, the judge said, "plaintiff's theory is that the engineer moved the engine, from where it stood at rest, forward to the crossing and it moved upon it when the intestate was in the act of crossing." That

was said in connection with a statement of defendant's claim that the engine was not backed at all, and did not blow off steam; and the judge left it to the jury to say which statement was true. Again, he stated plaintiff's claim to be that "when the engine ceased moving to the west, it suddenly started to move to the east, and moved with so much celerity that it came up to the highway just as the first team passed over," &c. and added, "It is also claimed by the plaintiff that it added to the danger that the engine gave no signal by blowing its whistle or ringing the bell and went with great speed, and that these men were waiting for an opportunity to cross, and had delayed crossing nearer until the train had passed." The charge had no other allusions to the speed of the backing engine. The court charged that if the engine was moved back as narrated by plaintiff's witnesses while Lenhart was going up to the track and the accident occurred, negligence on defendant's part can be found. He refused defendant's request to charge that if the jury should find that Lenhart's horses were frightened by the engines or trains while they were on the defendant's land, plaintiff could not recover. The court charged that the defendant had the legal right to move its engine back toward the crossing, as described by plaintiff's witnesses; but he refused to charge that if Lenhart's horses were frightened while the train was so moving plaintiff could not recover. He charged, also, that the

escape of steam, alone, would not constitute negligence. Defendant's employes testified that there was no occasion for backing the engine down to the highway, and they denied that it was done. The judge instructed the jury that in crossing highways the law imposes upon railroad companies the duty of observing "great" care and caution, adding, "I wish to be completely understood about this, and the duty which the railroad company owes to the travelling public is confined to the movements of its train or engine upon its track, and whether it has been guilty of negligence depends upon the particular circumstances of the case."

*E. C. Sprague*, for applt.

*W. F. Worthington*, for respt.

*Held*, The judge did not point out the speed of the backing engine as of itself an element of negligence; but only that the engine moved with such celerity as to intercept Lenhart.

The charge is consistent with the propositions that defendant had the right to back its engine and to blow off steam if the proper management of the engine required it, provided those acts were necessary to the prosecution of its business and were done with reasonable care; yet, if it did the same things unnecessarily, and without due care, it would be liable for injuries resulting therefrom.

By "great" care, the judge evidently intended to convey the idea, and the jury undoubtedly understood, that in running rail-

road trains the danger of collision with travellers in highways calls for the exercise of care proportioned to the danger. 67 N. Y., 417, 421.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### SHERIFFS FEES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles A. Mallory, *applt.*, v. Frederick Reichert, (Peter Bowe, Sheriff, *respt.*)

Decided March 7, 1884.

Under the statute authorizing the taxation of sheriff's fees the plaintiff, as well as the defendant, has the right to require the sheriff to have his fees on execution taxed.

The court at Special Term has the authority to make such taxation under its general jurisdiction over all actions pending in the court and after process issued therein.

Appeal from order of Special Term, taxing sheriff's bill on execution.

An execution was issued in this action against the property of defendant, and thereunder the sheriff levied upon certain goods belonging to him, and subsequently sold the same for \$3,488.39. He thereupon presented a bill for \$1,151.45. Plaintiff demanded a taxation of this bill, and, on his motion, it was taxed at Special Term, and the whole amount charged allowed to the sheriff, and from the order making such taxation plaintiff appealed.

Upon such appeal it was claimed by the sheriff that, under the

statutes, 3 R. S., 6th Ed., 924, § 1; Code Civ. Pro., § 3287, 3309, plaintiff had no right to require the taxation of his fees; and that the proceedings should be treated as a mere arbitration, and the parties left in the position in which they had placed themselves; or as wholly *coram non judice*, and a proceeding without jurisdiction, and the appeal dismissed without prejudice to an action.

*R. W. Hawksworth*, for applt.

*Knox & MacLean*, for resp't.

*Held*, That, under the statute, plaintiff had the right to demand the taxation; that plaintiff was entitled to have the money made on the execution paid to him, less the sheriff's legal fees and charges; and although the statute in speaking of taxation uses the words "upon being required by the defendant," still, under the circumstances, the plaintiff in the execution occupied that relation as between himself and the sheriff in his effort to defend himself against extortion. 47 Superior Ct., 500.

That, in this case, the motion for taxation was made, not to "any judge or officer of the court," but to the Court itself sitting at Special Term; and the Special Term, as such, had the authority to make the taxation in question under its general jurisdiction over all actions pending in the court and after process issued therein.

That, inasmuch as the items of the bill presented had received no consideration, the order should be reversed and the proceedings remanded to the Special Term with directions to tax the bill in con-

formity to the following authorities: 58 N. Y., 106; 47 Snpr. Ct., 500; 38 How. Pr., 173; 88 N. Y., 429; 90 N. Y., 521.

Opinion by *Davis, P.J.*; *Daniels* and *Brady, JJ.*, concur.

## DISCOVERY OF BOOKS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John R. Duff, *resp't.*, v. Wm. J. Hutchinson et al., *applts.*

Decided Feb. 1, 1884.

In an action brought by a principal against his agent for an accounting of the transactions of the agency, where the principal has kept no account of such transactions but relied upon those of the agent, and alleges that he has been defrauded by such agent, and where the relation of agency was of such a character as rendered it the duty of the agent to keep accounts of the transactions of the agency, a discovery of the books of the agent will be ordered to enable plaintiff to prepare for trial.

When the accounts for the discovery of which an application is made are of extensive transactions and time is necessary for their examination and consideration and the proper preparation of the case for trial, the fact that the books containing them can be procured at the trial by means of a *subpoena duces tecum* will not defeat the application for a discovery.

The fact that a discovery of the agent's books may establish the fact that he has been guilty of misconduct in his dealings with his principal is no answer to an application for such a discovery.

Appeal from an order directing a discovery of defendant's books and papers.

This action was brought for an accounting concerning large dealings had by plaintiff with defendants as stockbrokers. Plaintiff alleges that he had been defrauded

by defendants, and demanded a recovery of whatever amounts might appear to be due him on the accounting. The accounts of the transactions were entered on defendants' books, and, together with the correspondence retained or copied by them, constituted the evidence upon which plaintiff relied to establish his case, for he had not kept such a record of the business as enabled him to give any intelligent detail or description of its transactions; and he, therefore, applied for a discovery of defendants' books, &c. to enable him to prepare his case for trial. This application was resisted upon the ground, among others, that the books could be obtained upon the trial by means of a *subpoena duces tecum*, and that, if the matters to be disclosed were of the character claimed by plaintiff, defendants might thus be compelled to furnish evidence which might tend to criminate them.

*Wm. B. Putney and Jos. H. Choate*, for applts.

*Wm. G. Choate and Elihu Root*, for respt.

*Held*, That, inasmuch as the relations of defendants to plaintiff were those of an agency in which the course of the business rendered it their duty to keep accounts of the transactions of the agency, such accounts were not exclusively those of the agents themselves, but the principal was entitled, whenever an occasion might arise, to appeal to and consult the books and papers of the agents for his information, and to settle any differences or misunderstanding;

and, for that reason, and the additional fact that the books and papers of defendants contained the only intelligent and reliable evidence of their transactions, and plaintiff could not properly prepare for an intelligent trial of the action without them, a discovery was rightly ordered.

That the production of the books upon the trial under a *subpoena duces tecum* would not meet the exigencies of the case, for, without them, no adequate preparation could be made for the trial of the action; and, if such preparation should not be made before its commencement, a suspension would necessarily be required afterward to make the necessary examination and consideration of the books; and the case is not therefore within 55 How., 351; and neither the rules nor practice of the court on this subject requires this delay.

That the discovery may establish the fact of misconduct of defendants in their dealings with plaintiff is no answer to the application, for defendants themselves are not required to submit to an examination, and they are in no way obliged to become witnesses against themselves, and the order directing the discovery in no way interferes with their privileges as witnesses. Beyond that, they are not charged with criminal violations of the law, but simply with that line and degree of misconduct which violated good faith and fairness on their part, and they are not entitled to shield themselves against the discovery of their



books and papers because that may subject them to an exposition of such misconduct.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

### EXECUTION. CHATTEL MORTGAGE.

N. Y. COMMON PLEAS. GENERAL TERM.

Thomas C. Lyman et al., *appls.*,  
v. Peter Bowe, sheriff, *respt.*

Decided Jan. 21, 1884.

When a chattel mortgage reserves a right of possession to the mortgagor until demand of the debt secured, such mortgagor has an interest in the chattels which may be levied on and sold.

Appeal from judgment dismissing complaint.

Action by mortgagees under chattel mortgages against the sheriff for an alleged wrongful levy on the chattels under judgments against the mortgagors.

The chattel mortgages were conditioned for the payment of certain moneys on demand; no demand had been made on the mortgagors, and the respondent levied upon the property while in their possession.

*Felix T. Murphy* and *E. D. McCarthy*, for *appls.*

*Charles F. McLean*, for *respt.*

*Held*, That the complaint was properly dismissed. The interest of mortgagors having a right to redeem, and a right to the possession of the mortgaged property for a definite period, is subject to levy and sale on execution. 1 N.

Y., 295; 19 How. Pr., 481; 38 Barb., 178.

The question presented by this appeal is whether or not the admitted possession by the mortgagors was for a definite or uncertain and contingent time.

In the case at bar there could be no default, with consequent right of possession, until demand of payment. This gives a far more definite character to the mortgagor's possession than if held with an insecurity clause in the mortgage, as in 19 How. Pr., 481 and 38 Barb., 178. It was certain, because continuing until demand for payment, and until default then made the mortgagees had no right to take the property. 7 Daly, 375.

*Hathaway v. Brayman*, 42 N. Y., 322, followed.

Judgment affirmed, with costs.

Opinion by *Beach, J.*; *Van Brunt, J.*, concurs; *Van Hoesen, J.*, concurs in the result, holding that the dicta in the above cases should not induce the Court to overrule the decision made, upon great deliberation, 3 E. D. Smith, 123, to the effect that, though the mortgagor has the right of possession until the mortgagee demands payment the interest of the mortgagor is not subject to levy.

### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Wm. H. Coffin et al., *respls.*, v. J. M. Stitt, *applt.*

Decided March 7, 1884.

Although the affidavit on which a warrant of attachment is issued fails to state a cause of action the attachment is not rendered incurably defective thereby, and if a motion to vacate it is made upon affidavits on the part of defendant plaintiff can sustain it by additional affidavits showing that a cause of action exists.

Appeal from order denying motion to vacate an attachment.

This action was commenced on Nov. 16, 1883, to recover a balance of indebtedness for money loaned amounting to the sum of \$24,902.19, and it was alleged in the affidavit on which the attachment was granted, without stating when any particular sum of money was loaned, that the money had been loaned from time to time between the 1st of June, 1882, and the commencement of the action.

Defendant moved to vacate this attachment on affidavits denying the existence of this alleged indebtedness; and in reply plaintiffs submitted an affidavit alleging that the money had been loaned to defendant during and previous to the month of June, 1883, and that since that time he has been repeatedly requested to pay the amount of his indebtedness to plaintiffs, but that he had failed to do so.

*Anderson Price*, for applt.

*H. E. Allen*, for respts.

*Held*, That what part of the money still remained unpaid which was loaned before the day on which the action was commenced, or on that day, was not stated in the affidavit on which the attachment was granted; and it was entirely consistent, therefore, with the statement in such affidavit

to assume that the bulk of the money still unpaid was loaned upon that day and, therefore, not due at the time when the suit was commenced and if the motion had been confined to this affidavit probably that conclusion would have required the attachment to be vacated; but that, since defendant moved to vacate the attachment on affidavits denying the existence of the alleged indebtedness, plaintiffs were entitled to oppose the motion by new proof tending to sustain any grounds for the attachment recited in the warrant, Code Civ. Pro., § 683, and they had the right, therefore, to add, as they did, a further affidavit on their part substantially showing that defendant was so indebted to them and that the debt had matured before the day on which the action was commenced.

Order affirmed.

Opinion by *Daniels, J.; Davis, P. J.*, and *Brady, J.*, concur.

### COUNTERCLAIM.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Charles A. Clegg, applt.*, v. *Wm. E. Cramer et al.*, *respts.*

Decided March 7, 1884.

When the plaintiff in an action sues a number of defendants on a contract which he alleges to have been made with all jointly, and certain of the defendants answer, denying that the obligation is joint and alleging that the contract was made by them exclusively, they can set up a counterclaim existing exclusively between themselves and plaintiff.

Appeal from an interlocutory judgment overruling a demurrer to the answer.

This action was brought for the breach of a contract alleged to have been made with defendants jointly for the publication of advertisements and for the recovery of an amount alleged to have been paid for advertisements not actually made. Three of the defendants answered, alleging in substance that the contract was made with them exclusively and setting up a large number of counterclaims as existing in their favor. Plaintiff demurred to these counterclaims upon the ground that as they were not alleged to exist in favor of all the defendants they were improperly set up.

*W. H. O'Dwyer*, for applt.

*John K. Porter*, for respts.

*Held*, That even if the complaint set forth a joint contract as the ground of the action the court at the trial could still award judgment in favor of plaintiff against these three defendants and dismiss the complaint as to the rest if as a matter of fact it should be made to appear that they were the only persons liable to plaintiff. Code Civ. Pro., § 1204; 28 N. Y., 169. And by the answer of the three defendants they asserted that to be the nature of the liability. They were not concluded upon this subject by any allegations contained in the complaint, but were at liberty to deny the alleged joint liability and to allege that the contract was made by themselves with plaintiff, and if they should turn out to be correct

in those allegations then the action would become one between plaintiff and themselves and in that contingency the counterclaims set forth by them in their answers would be legally applicable to any claim which might exist in favor of plaintiff under the agreement or agreements relied upon by him.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Bradley, J.*, concur.

## NEGLIGENCE. HORSE CARS.

N. Y. COMMON PLEAS. GENERAL TERM.

*Annie Black, applt.*, v. *The Forty Second St. & Grand St. Ferry R.R. Co.*, *respt.*

Decided Jan. 21, 1884.

As to persons lawfully traveling the public streets it is the duty of a railroad company to provide appliances without defect and reasonably adequate and safe, but negligence in this regard is not shown by proof that the horses by which plaintiff was injured were fastened to the car by means of a ring and hook in such manner that when frightened they detached themselves from the car and in running away inflicted the injuries complained of.

Appeal from judgment entered on dismissal of complaint at trial term.

Plaintiff, while standing on the sidewalk, was run over by a team of defendant's, used in drawing a horse railway car. The horses were frightened by the firing of a cannon and the discharge of fireworks while a procession was passing. They sheered to one side and so detached themselves from the car.

No negligence of the driver or defect in equipment was shown, except that the horses were attached to the car by a ring on the lead bar which passed over a hook affixed to the car. Evidence was given showing this method in use by some companies, while others used the ring and a pin.

*Erastus New*, for applt.

*Freling H. Smith*, for resp't.

*Held*, That the complaint was properly dismissed. There appears to be no evidence which would support the finding of a jury of either negligence in defendant's driver or defect in equipment. Defendant's legal duty affecting plaintiff and others lawfully traveling the public streets was to have appliances without defect and reasonably adequate and safe. 51 N. Y., 495. That, under the circumstances of this case, the horses became detached does not tend to prove the converse of the principle. Defendants were not bound to provide against firing of cannon or the discharge of fireworks. If so, it would be their duty to fasten the horses to the car in a way preventing their escape under all circumstances. This might increase danger for passengers in the same ratio as lessening it for passers on the highway. The method of attachment by hook and ring is shown to be in general although not exclusive use. But there is no evidence in the record tending to show it not reasonably safe.

Judgment affirmed, with costs.

Opinion by *Beach, J.*; *Van Brunt* and *Van Hoesen, JJ.*, concur.

Vol. 19.—No. 2

## EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jeremiah B. Taylor, *resp't.*, v. John T. Meldrum, sheriff, *applt.*

Decided Jan., 1884.

In an action brought by one claiming title to goods through a transfer from a deceased person against a sheriff who has levied on the goods by virtue of an execution against deceased, the plaintiff cannot testify in his own behalf as to what took place between himself and deceased at the time of the transfer.

Appeal from judgment on referee's report.

One Downing transferred certain personal property to plaintiff in July, 1878. Downing died after the commencement of suit and before trial. Plaintiff claimed title to the property through said transfer, and defendant claimed it by virtue of a levy under an execution issued upon judgment against Downing. At the trial, plaintiff was asked, as a witness in his own behalf, to state what occurred between him and Downing on July 27 and 28 (the time of the alleged transfer), in relation to the goods. Witness was allowed to answer, and said: "On the 28th I went down there, he got the key and went in and showed me these goods. Downing said he turned the goods over to me in satisfaction of a part of what he owed me; we stayed there a few minutes and he wanted me to take the key. I said, 'I don't want to carry it.' He said he would take it down and leave it with Mrs. Downing." The witness had been examined

by defendant, but so far as the answer relates to the consideration for the transfer it is new matter, and the testimony previously given by the witness in relation to the transfer was mostly either drawn out by the plaintiff's counsel in the face of defendant's objections, or elicited by defendant on cross-examination as to the matters stated by the witness on his direct examination.

*Sedgwick, Ames & King*, for appt.

*Waters, McLennan & Dillaye*, for respt.

*Held*, That the testimony was directly within the prohibition of § 829, Code of Civ. Proc. Both parties to the suit claimed to derive title through deceased, and the testimony was given by the witness in his own behalf, and it related to a personal transaction between himself and deceased.

Defendant availed himself of his objection at the first opportunity.

Judgment reversed, and new trial ordered before another referee, costs to abide event.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### RECEIVER. REFEREE. PRACTICE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

A. Barton Hepburn, recr., *ap-  
plt.*, v. William H. Montgomery  
et al., *respts.*

Decided Jan., 1884.

A general exception to "each of the conclusions of law" in a referee's report raises no specific question.

A general exception to a referee's report which contains a correct proposition is of no avail.

Defendant's original right of set-off is not affected by the appointment of a receiver of the plaintiff.

Appeal, in each of three cases, from judgment on referee's report.

The Continental Life Ins. Co. was incorporated under Ch. 463, Laws of 1853, and continued in business until October, 1876, when it became insolvent and suspended. In March following this Court rendered a judgment dissolving said corporation and appointing a receiver. Defendant Montgomery was the company's agent for a designated district from February, 1869, until its suspension, under successive contracts made in 1869 and 1875. His compensation was to be a certain commission on premiums received. Each of said contracts also provided that at or after its termination M. should be paid, if he so elected, in commutation and satisfaction of all commissions to become due, a sum equal to 20 per cent. of the aggregate premiums for one year on certain specified policies. One of said actions was to foreclose a mortgage made by M. to the company for \$10,000; another was to foreclose a mortgage made by M. to one C. for \$1,500, and by C. assigned to the company. In those two actions M. set up a counterclaim of his commuted commissions under the contract, and the referee sustained the defence. The third action was for a balance

claimed to be due upon M.'s account as agent. The referee held that there was no personal liability on M.'s part for such balance, and each action was dismissed. The questions now up are upon plaintiff's exceptions to the referee's report.

*Edward H. Hobbs*, for applts.

*Dunning & Robinson*, for respts.

*Held*, That the rule that a general exception to "each of the conclusions of law," where there are several, is insufficient to raise any specific question, and is of no avail, applies to exceptions taken to a referee's report after it is filed. 20 How. Pr., 414; 33 N. Y., 83; 38 id., 263; 87 id., 550. Under that rule the exceptions to the conclusions of law in each of these actions are unavailing and raise no specific question for review.

The general exceptions to the reports in the several cases are of no avail, because each of the reports contained the correct proposition that defendant was not personally liable to the company for the expenses of conducting the business of his agency.

Defendant had the right, before the receiver was appointed, to set off the commutation money against the debt owing by him on the mortgages, and that right was not affected by the appointment of a receiver. 1 Paige Ch., 444; id., 585; 54 How. Pr., 385.

*People v. Globe Mutnal Life Ins. Co.*, 91 N. Y., 175; and *Atty-Gen'l v. Continental Life Ins. Co.*, *in re Jewell*—decided by Court of

Appeals, June, 1883, distinguished.

Each judgment affirmed, with costs of one appeal, and disbursements in each.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## CONTRACT. CONSTRUCTION. SET-OFF.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

*James J. Belden et al., applts.,*  
*v. The State, respt.*

Decided Jan., 1884.

Construing certain canal contracts, and *deciding* that overpayments by the State on one contract, in the absence of fraud, are a good set-off in an action by the contractors on the other contracts.

Appeal from decision of the late Board of Audit, dismissing appellants' claim against the State.

The claim is for amounts alleged to be unpaid on certain canal contracts, designated as "A," "B" and "C." The Board of Audit found an unpaid balance on each of the contracts "B" and "C;" and found that the claimants had been overpaid on contract "A" in a sum largely exceeding the amounts unpaid on "B" and "C," and on that ground the entire claim was dismissed. The specifications of contract "A" provide that all materials excavated "shall be deposited so as to form the necessary banks for the canal, and in such other places as the State engineer shall direct, and when the same are carried over 200 feet parallel with the line of

the canal, for the purpose of making embankments for the canal, or for the same distance in direct line to form bridge embankments, or guard banks (spoil banks not included), the same shall be paid for both as excavation and embankment. No materials embraced under the head of excavation, and paid for as such, will, when deposited in any embankment, be paid for as embankment unless the same has been moved 200 feet in a line parallel with the canal, except as before specified for bridge embankments, and all embankments made from materials not embraced in the excavation will only be paid for as embankment." Appellants claimed for over 73,000 yards of embankment. The Board allowed them for less than 11,000 yards. The rest was composed of materials which had been paid for as excavation, and none of it had been moved 200 feet, and none was for bridge embankment. Appellants claim that when the excavation was made much of the earth was frozen and unfit to be placed in the bank. It was, therefore, placed in "spoil bank," and when it thawed it was placed as embankment. Proof was given as to the custom in such case. The contract expressly provided that the work should be done so as not to interfere with the use of the canal. The State engineers made monthly estimates of the work done, and the disbursing agents of the State made payments thereon from time to time out of the appropriations therefor.

*M. A. Knapp*, for appls.

*Leslie W. Russell*, Attorney-General, *James A. Dennison*, Deputy Attorney-General, and *D. Magone, Jr.*, for respt.

*Held*, That the language of the specifications is clear, and hardly admits of construction. If the necessity of putting the earth in spoil bank arose from the fact of its being frozen, the parties must be presumed to have foreseen that contingency. Plaintiffs' contention would alter the contract.

It is very doubtful whether custom would affect the contract; and the finding in that regard cannot be said to be clearly against the weight of evidence.

The State is not estopped from asserting the overpayments on contract "A" in set-off against the claims on contracts "B" and "C." The monthly estimates and the inspection were subject to final estimate and settlement. 50 N. Y. 145.

We regard the case of *The People v. Dennison*, 19 Hun, 137, and 80 N. Y. 656, as a conclusive adjudication adverse to the State on the question of fraud on claimants' part. But we do not think the case goes to the length of concluding the State upon the question of mistake of facts, and of adjudging that the State cannot recover back from the claimants any sum that may have been overpaid them on contract "A." Unless there has been legislative sanction and ratification as to the sums overpaid they constitute a just and legal set-off to the claims in contracts "B" and "C," and being in excess of such claims they are a full defence thereto.

Decision of Board of Audit affirmed, with costs.

Opinion by *Smith, P. J.*; *Barker, J.*, concurs; *Hardin, J.*, dissents, he being of the opinion that judgment should be ordered in favor of claimants for the amounts unpaid on contracts "B" and "C."

### FRAUDULENT CONVEYANCE. EVIDENCE. JUDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Robert Baker, *respt.*, v. John McLoughlin et al., *appls.*

Decided Jan., 1884.

Certain evidence held sufficient to support a decision that certain instruments are fraudulent and void.

The reception in evidence against a party to a civil action of an answer given by him upon examination in supplementary proceedings, *Held*, No error.

A party may contradict the statements of his own witnesses as to particular facts.

The original summons may be received to supply defects in a justice's docket.

Defendant having answered, a successful plaintiff may take any judgment consistent with the case made by the complaint and embraced within the issue.

Appeal from judgment on referee's report.

Action to set aside a deed of real estate from John McLoughlin and wife to their son, John R., and a life lease of the same property from John R. and wife to his mother, as fraudulent and void as to plaintiff, who is a judgment creditor of John McLoughlin. The deed was prepared at John's direction, without his son's knowledge, after the latter had left home. The father wrote telling his

son what he had done and asking him to execute a lease to the grantor's wife for five years at the annual rent of five dollars, to enable them to keep their home. The son did so, and on his returning the lease executed the deed was sent to him. No part of the alleged consideration passed when the deed was executed. Testimony by the different defendants as to the real consideration was contradictory in numerous respects upon vital points; and they were the only witnesses to that point. Plaintiff put in evidence the deposition of John McLoughlin taken in certain previous supplementary proceedings. Plaintiff also put in evidence a justice's docket to prove his judgment against McLoughlin; the docket did not state by whom the summons was issued, its date, or the time when it was returnable. To supply those defects plaintiff put in evidence the original summons with the constable's return indorsed on it. Defendants contend that the judgment, instead of directing a sale through the medium of a receiver, should leave plaintiff to his remedy by execution, the transfers being set aside.

*F. N. Fitch*, for *appls.*

*Lansing & Rogers*, for *respt.*

*Held*, We cannot say that the referee's finding of fraud is not warranted by the evidence.

The reception of the deposition in evidence was no error. Section 2460 of the Code of Civ. Pro. does not apply to this case, which was begun prior to Sept. 1, 1880. See § 292, Old Code.



Permitting plaintiff to contradict the testimony of John and his son, after using their depositions, was not error. 4 N. Y., 311; 1 Lans., 121.

The admission of the justice's summons was right. 19 Wend., 477; 4. Comst., 375.

The form of the judgment is one prescribed by the decisions. 12 Hun, 306, and cases cited by Bockes, J. That such relief is not specifically asked for in the complaint is immaterial. An answer having been interposed, plaintiff may be permitted to take any judgment consistent with the case made by the complaint and embraced in the issue.

Judgment affirmed, with costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### DEEDS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William H. Bloomingdale, *applt.*,  
v. Augustus Sherman, *respt.*

Decided Jan., 1884.

A deed describing the lands conveyed as bordering on a river beginning at "low water mark," thence to a point one rod from the brink of the river; thence by different courses to the river and as it winds and turns to the place of beginning, does not embrace any portion of the river, but only lands bordering on it.

Plaintiff appeals from a judgment dismissing his complaint, which stated that plaintiff was the owner of lands under the Hudson river in his possession, valuable chiefly as booming grounds for

catching and storing saw-logs; that such booming grounds were necessary to plaintiff for the use and enjoyment of his saw-mills below; that defendant has no rightful claim or title thereto, but that he claims the right to control and use the same and has, with a strong force and a large number of persons, entered upon said premises and fastened booms to piers there belonging to plaintiff and threatens by violence to hold and possess such booms, piers, &c., and exclude plaintiff therefrom. The relief demanded is an injunction to prevent such interference.

Defendant's answer denies in substance the complaint, and alleges that said booming ground is an appurtenance to defendant's mill below and the right to use and control the same was conveyed to him with his said saw-mill.

Plaintiff gave in evidence conveyances of land described in substance as follows: All that piece of land, &c., bordering on the Hudson river, bounded and described as follows: Beginning at low water mark on the line between the lands of the grantors and one M. B. Parks, and running thence southerly on said line to a point one rod from the brink of the river bank; thence easterly on a line parallel with said river to a point on the line between the lands of the grantors and lands of one Hiram Parks, which point is one rod from the brink of the river bank; thence northerly along said line to said river as it winds and turns to the place of beginning, containing about one acre of land,

be the same more or less, excepting and reserving the right to pass over said premises for the purpose of using the water of said river for watering cattle or other like purposes.

Under such conveyances plaintiff claims his title goes to the center of the river and is not limited to low water mark.

The trial judge held that nothing was conveyed below low water mark, and that plaintiff took no title to the booming grounds in controversy by virtue of such grants.

*Waldo & Grover*, for applt.

*Stephen Brown*, for resp't.

*Held*, That the language used in the conveyance from B. and wife clearly indicates that the property did not embrace any portion of the river, but only the lands bordering on it, that is, touching at the edge of the river, reaching to it, contiguous to it. Such definitions of necessity exclude the river from the premises conveyed. Such exclusion is further emphasized by the point of beginning, "at low water mark on the line," &c. Significance attaches to these words. They mean something more than beginning at the Hudson river on the line between, &c. The limits of the lands conveyed are defined by the words "low water mark." Unless such construction is given, the natural and ordinary signification of the words is disregarded and other words having a more unrestricted signification are substituted by implication. 27 Hun, 1; 87 N. Y., 287; 4 Hill, 369, 373; 1 Abb. Dec., 39.

14 Mass., 149; 23 N. Y., 498; 24 Wend., 452, distinguished.

Besides, the quantity of land purporting to be conveyed, "about one acre of land, be the same more or less," sustains defendant's position. The amount of land conveyed stopping at the water's edge would be not very far from one acre. But if plaintiff's claim be sustained he would have taken some ten acres of land instead of one, for the river is found to be 30 or 40 rods or more wide at that point, and the line parallel with the river is about 80 rods long.

We also think that plaintiff failed to prove any cause of action of an equitable nature. The most shown by the case is a mere trespass unaccompanied by any damage. If nominal damages only were recoverable a new trial would not be granted.

Judgment affirmed, with costs.

Opinion by *Boardman, J.*; *Learned, P. J.*, and *Potter, J.*, concur.

## EXTRA ALLOWANCE.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. The Genesee Valley Canal RR. Co. et al., *applts.*

Decided March 21, 1884.

Where the question in controversy was the right of defendant to construct its road on the line located by it, the primary question being the value of the disputed franchise, proof was given of the amount expended on the located line and the increased cost of constructing on the line claimed by plaintiffs, but no proof as to the value of the franchise if undisputed. *Held*, That these

facts could not furnish the measure of value and that no facts were presented which could serve as a computation upon which to predicate an extra allowance.

The chief question involved in this action is the right of defendant, under its charter and a contract with the state, to construct its road upon the line located by the company near the village of Nunda in the county of Livingston, instead of upon the route of the Genesee Valley Canal through that village. The court dismissed the complaint. If the action had been maintained the RR. Co. defendant would have been deprived of the franchise claimed by it to construct the road on the located line, the primary interest involved in the controversy being the value of the disputed franchise. The amount said RR. Co. had expended upon the located line was proved, as was also the increased cost of constructing the road on the line of the canal. There was no proof as to the value of the franchise if undisputed. A motion for an extra allowance was denied.

*George Zabriskie*, for applts.

*Leslie W. Russell*, Atty. Gen., for respts.

*Held*, No error; that no facts were presented which would serve as a basis of computation upon which to predicate an extra allowance. Neither the amount already expended by the RR. Co. on the located line, nor the increased cost of constructing the road on the line of the canal, furnish the measure of value.

Order of General Term, affirm-

ing order denying motion, affirmed.

*Per curiam* opinion. All concur.

## MORTGAGE.

N. Y. COURT OF APPEALS.

Spencer, *respt.*, v. Spencer. *admr.*, *applt.*

Decided March 21, 1884.

Plaintiff gave to S. a mortgage which contained no covenant to pay, but provided that the mortgagee should look to the land. No bond was given. Thereafter the land was sold to one L., who assumed payment of the mortgage and paid the balance of the purchase to S., under an agreement that the latter should pay the same to plaintiff with interest. In an action to recover said balance, defendant counterclaimed for a deficiency on foreclosure of the mortgage. There was some evidence that S. advanced money for plaintiff's benefit when the mortgage was given. *Held*, That the counterclaim was properly rejected.

S. agreed with the owner of the equity of redemption to extend the time of payment. At the time of such extension the premises exceeded in value the amount of the mortgage. *Held*, That plaintiff was thereby released from liability, if any existed.

Plaintiff presented to the defendant, as administratrix of J. P. S., a claim for \$708 and interest thereon from April 1, 1871, less a payment of \$400, made May 8, 1876. It appeared that on March 16, 1871, plaintiff sold to W. B. L. a farm for \$2,000, on which J. P. S. then held a mortgage given by plaintiff for \$1,292. W. B. L. assumed payment of this mortgage, and paid the balance of the purchase price, \$708, to J. P. S. upon an agreement with him and plaintiff that J. P. S. should take security from W. B. L. for the \$708,

and pay it to plaintiff, with interest from April 1, 1871. The evidence showed that J. P. S. received the \$708. In May, 1876, he paid plaintiff \$400 of this sum. J. P. S. died in the fall of 1876, and the \$1,292 mortgage not having been paid, it was in June, 1879, foreclosed by defendant, his administratrix, and the land sold for \$200, leaving a deficiency of \$1,040, which deficiency defendant interposes as a counterclaim. Plaintiff claims she is not liable therefor for the reason that no bond was executed by her with the \$1,292 mortgage. The referee found that no bond was given by plaintiff to accompany the \$1,292 mortgage. He also found that there was no evidence to establish the fact of a pre-existing debt from plaintiff to J. P. S. at the time said mortgage was given, and rejected the counterclaim. Some evidence was produced to show that J. P. S. advanced money for plaintiff's benefit at the time said mortgage was executed. Said mortgage did not contain any covenant or promise on the part of the mortgagor to repay the moneys advanced, but provided, in effect, that the mortgagee should look to the mortgaged premises alone for the reimbursement of his advances. One witness testified that the mortgage was given for an amount due the mortgagee, but did not specify from whom it was due, or the condition of the indebtedness.

*M. M. Waters*, for applt.

*C. A. Clark*, for resp't.

*Held*, That the counterclaim was properly rejected.

Vol. 19.—No. 2a.

It appeared that on October 18, 1878, J. P. S. entered into an agreement with one M., the owner of the equity of redemption of the mortgaged premises, founded upon a good consideration and providing for an extension of the time of payment of the mortgage beyond the period fixed. The evidence showed that the mortgaged premises exceeded in value the amount of the mortgage when the extension was granted.

*Held*, That the agreement of extension deprived plaintiff of the privilege to which she would otherwise be entitled, of paying the debt when it became due and using the mortgage to reimburse herself to the extent of the value of the land; that J. P. S. having been present and participating in the negotiations which preceded the execution of the contract whereby W. B. L., plaintiff's grantee, assumed payment of the mortgage, and taking the entire consideration paid by W. B. L. on his purchase, in the absence of any request by defendant for a finding to the contrary, may be assumed to have taken cognizance of the terms and conditions of the contract, and had notice of the fact that plaintiff thereby became a mere surety for the payment of the mortgage debt. He had notice from the relation of the parties and the nature of the mortgage security that the land was the primary fund for the payment of the mortgage debt, and to the extent of the value of the land plaintiff occupied the position of a surety, and was entitled upon payment of the

mortgage debt to be substituted to the mortgage security as it originally existed, with the right to proceed immediately against the land for her indemnity; that plaintiff has by the action of J. P. S. been released from liability, if any existed, for the payment of the mortgage debt. 73 N. Y., 211; 76 id., 274; 94 id., 613.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

### APPEAL.

#### N. Y. COURT OF APPEALS.

*In re* application of Ensign, *applt.*, v. Cuykendall, *recr.*, *respt.*

Decided March 21, 1884.

The General Term reversed, without prejudice, an order directing the receiver to pay certain moneys to the petitioner. The facts relating to the fund and the claims of the parties interested therein did not clearly appear in the papers presented. *Held*, That it was within the discretion of the General Term to decree as it did and that its order is not appealable.

This was an appeal from an order of General Term, reversing, without prejudice to any subsequent proceedings or suit and without costs, an order of Special Term directing C., as receiver of the D. & S. Mfg. Co., to pay to E., the petitioner, a sum of money, with interest which may have accrued thereon while in the hands of the receiver, with costs of motion. Upon the papers presented the court below might well have been of the opinion that the facts

relating to the fund in question, and the claims of the various parties interested therein, did not so sufficiently and clearly appear as to enable them intelligently to adjudicate upon the questions involved.

*Richard C. Steele*, for *applt.*

*William F. Cogswell*, for *respt.*

*Held*, That the order was not appealable, as it was clearly within the discretion of the General Term to reverse the order of the Special Term and send the case back for further proceedings.

Appeal dismissed.

Opinion by *Ruger, Ch., J.* All concur.

### RAILROADS. NEGLIGENCE.

#### N. Y. COURT OF APPEALS.

*Ellis*, admr., *applt.*, v. The N. Y., L. E. & W. RR. Co., *respt.*

Decided April 15, 1884.

Plaintiff's intestate, an employee of defendant was killed by a collision with a train which came from the rear of the train on which he was working, the forward car being forced up on to the caboose crushing intestate, who was on the platform. It appeared that the buffers of the cars were at different elevations and did not meet properly. *Held*, That the primary cause of the death being the failure of defendant to supply proper buffers it was liable and was not absolved from liability by the negligence of its employees on the other train.

This action was brought to recover damages for the alleged negligent killing of E., plaintiff's intestate. It appeared that E., at the time of his death, was in defendant's employ as a brakeman, and engaged in the actual discharge

of his duties in working and running a train of freight cars. This train had nearly reached its destination when another of defendant's trains running in the same direction overtook it. E. was in the caboose at the rear of his train, and seeing that a collision was imminent, went forward towards a coal car to which the caboose was fastened, and had apparently reached the platform of the caboose when a collision took place, the platform of the caboose was forced under the coal car, the whole body of the coal car going upon the caboose platform and E. was caught between the ends of the two cars and crushed to death. It was proved that each car was furnished with a buffing apparatus ten inches thick, but at such different elevations that instead of meeting to receive the concussion they exposed to the blow only a surface of three-quarters of an inch. Defendant claimed that the facts proved did not show negligence on the part of defendant; that the negligence, if any, was that of the person who made up the train, who must be deemed a fellow servant of the deceased; that the collision was the proximate cause of his death and resulted from the negligence of the persons in charge of the colliding train.

*John W Lyon*, for applt.

*Lewis E. Carr*, for respt.

*Held*, That plaintiff was entitled to recover, the primary cause of the death of his intestate being the failure of defendant to supply its cars with proper buffers, and it was

not absolved from the consequences of its wrongful act by the negligence of its employees in charge of the train which collided with the one on which plaintiff's intestate was killed. It is enough that the fault or omission of defendant merely contributed to produce the injury complained of, or if it failed to exercise the care of an ordinarily prudent person in supplying cars reasonably safe for the purposes for which they were required. The evidence was sufficient to warrant a submission of the case to the jury. 93 N. Y., 532; 92 id., 639; 91 id., 332; 88 id., 225; 73 id., 38; 60 id., 607; 53 id., 550.

Judgment of General Term, affirming judgment dismissing complaint, reversed and new trial ordered.

Opinion by *Danforth, J.* All concur.

## LAND CONTRACT.

N. Y. COURT OF APPEALS.

*Crowe*, individually and as admr., et al., *respts.*, v. *Lewin*, *exr.*, *applt.*

Decided April 15, 1884.

Plaintiff's intestate agreed to exchange his house and lot for four lots claimed to be owned by defendants. Defendants' deed described said lots, but in fact they did not own them. In an action to rescind the contract and intestate's deed defendants claimed that they intended to convey a triangular piece near by and that the description in the deed was substituted by mistake and asked to have their deed reformed. *Held*, That this could not be done; that as the minds of the parties did not meet no actual contract existed and the former contract should be rescinded and the parties restored to their original positions.

This action was brought to have a deed executed by C., plaintiff's intestate, rescinded on the ground of fraud. It appeared that C. agreed to exchange a house and lot, owned by him, for four lots at William's Bridge which defendants represented they owned and could convey. As matter of fact defendants did not own said lots, but did own a triangular piece of land in the vicinity of trifling value and much less area, which they say was what they intended to convey but by mistake the said four lots were substituted in the deed they gave. Defendants asked to have their deed reformed by substituting in it the triangular lot. A judgment was rendered for plaintiffs.

*Coles Morris* and *Michael H. Cardozo*, for applt.

*William F. Reilly*, for respts.

*Held*, No error; that as the minds of the parties to the contract had not met and as no actual contract existed the former contract was properly rescinded and a restoration to each party of what has been parted with on its faith was proper.

It appeared that there was at the time of the conveyance a mortgage on plaintiff's property, which, by acceptance of the deed, defendants assumed and agreed to pay. They claim that they are left liable for the amount of the mortgage debt.

*Held*, Untenable; that the judgment binds both parties and privies, and the holder of the mortgage, who had no right except through the promise to plaintiff

and dependent wholly upon it, and could only claim through it, is bound, if not by the judgment itself, at least by the effect of the judgment as annulling the whole transaction. 85 N. Y., 30.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Finch, J.* All concur.

## EVIDENCE.

### N. Y. COURT OF APPEALS.

*Cuddeback, applt.*, v. *Sherman et al.*, *respts.*

Decided March 21, 1884.

In an action of foreclosure where the defence was usury defendant's agent was allowed to testify to a conversation between himself and defendant prior to the loan, in the absence of plaintiff, tending to show that defendant contemplated making an usurious transaction. *Held*, Error.

Evidence as to what took place between plaintiff and defendant's agent while the latter was engaged in the execution of his agency was offered on the question of usury and excluded. *Held*, Error.

This action was brought to foreclose two mortgages. The judgment of the Special Term declared one of them void for usury. The testimony was very conflicting. The question of usury depends largely upon the relative credit given to the testimony of the plaintiff on one side and of the defendant on the other. The court permitted one D. to state a conversation between himself and the mortgagor, prior to making the loan, and which was had in the absence of plaintiff, and tended to show from the outset that the

mortgagor, whose agent the witness was, was contemplating an usurious transaction.

*W. H. Cuddeback*, for applt.

*Lewis E. Carr*, for respts.

*Held*, Error.

The answer alleged in substance that D. was defendant's agent. Plaintiff offered to prove what took place between himself and D. while the latter was engaged in the execution of his agency. This evidence was offered as bearing upon the usurious agreement pleaded. It was excluded.

*Held*, Error.

Judgment of General Term, affirming judgment adjudging one of the mortgages void for usury, reversed and new trial ordered.

*Per curiam* opinion. All concur.

## LUNATICS.

### N. Y. COURT OF APPEALS.

*Riggs*, admr., *respt.*, v. The American Tract Soc., *applt.*

Decided April 15, 1884.

Unsoundness of mind is established when it is shown that the person was laboring under a delusion and was led to perform the act sought to be revoked by a belief that something existed which had no existence, except in his own imagination, and out of which he is incapable of being reasoned.

Plaintiff's intestate was a man of eccentric habits, and labored under an insane delusion that his family were inimical to him. Defendant's agent, with knowledge of these facts, advised him to dispose of his property during his life and not leave it as a source of litigation after his death, and offered in case he would then give defendant what he intended to leave it that it would pay interest on it during his life. This was done. In an action to revoke the agree-

ment and recover the moneys paid, *Held*, That these facts were sufficient to justify a finding of unsoundness of mind and that defendant knew and took advantage of it; that it was bound by its agents' knowledge and that a charge that plaintiff could not recover unless intestate was of unsound mind at the time of the transaction and the agent had notice of his condition was sufficiently favorable to defendant.

Affirming S. C., 16 W. Dig., 391.

This action was brought to recover \$4,000 and interest, given by R., plaintiff's intestate, in his lifetime, to defendant, the latter agreeing to pay interest thereon to R. while he lived and after his death to his widow and sister during their lives. The right to recover was based on the ground that at the time said gifts were made the donor was of unsound mind. A verdict was rendered for plaintiff, which was affirmed by the General Term. The evidence tended to show that for many years before his death R. was of eccentric habits and manners, but always managed his own affairs; that at the time of said gifts and for a long time before and until his death he was the subject of insane delusions in regard to his wife and children, and believed that they had conspired to break up his family, destroy his authority over them, deny him obedience and regard, and were his enemies and very bad people who desired to injure him personally and poison him, and hence were not proper recipients of any of his estate. The evidence showed that R. was sincere in this belief and that there was no foundation for it. The evidence also tended to show that,



with knowledge of R's feelings towards his family and his apprehensions that any will he might make which diverted his property from them would be successfully contested on account of his incapacity, C., an agent of defendant, advised him he could dispose of his property during his lifetime and that he had better do so than to let it remain as a source of litigation after his death, and upon R. saying he needed the use of the money, suggested that defendant would rather receive what he intended to give and pay interest on it during his life than run the risk of a litigation. C. had several interviews with R., at some of which R. referred to his family matters, speaking of his children as disobedient. C. testified that he cut short his visits when R. began to talk of them and that he had tried to forget what he said; that his words were disagreeable. C. swore that he received the impression that the condition of R.'s mind in regard to his feelings towards his family was morbid, unhealthy, and perhaps a "diseased condition."

*Howard Payson Wilds*, for applt.

*H. V. Howland*, for respt.

*Held*, That the evidence was sufficient to justify the jury in finding unsoundness of mind on the part of the donor and that the defendant both knew and took advantage of it.

The Court charged that plaintiff could not recover unless: 1st. R. was at the time of the transaction

of unsound mind; 2d. That defendant's agent had notice of his condition; and he told the jury that plaintiff could not recover if either proposition was found in defendant's favor.

*Held*, That the charge was sufficiently favorable to defendant.

Defendant's counsel requested the court to charge that however great or numerous the delusions of a party may be, and however closely connected with the act in question, it will not be invalidated unless there has happened to him a "total deprivation of sense." This request was refused.

*Held*, No error. The phrase "unsound mind" is satisfied when it is shown that the person whose act is challenged, at the time of its commission, was laboring under a delusion, and was led to perform the act by a belief that something existed which had no existence whatever but in his own heated imagination, and out of which he is incapable of being reasoned. If a delusion exists upon one subject the person is of unsound mind, although in regard to other subjects he might reason and act like a rational man. 33 N. Y., 619; L. R., 3 P. & D., 68; 34 N. Y., 190; 3 Add. Ecc. R. 79; 1 Story on Con., 17.

Defendant is bound by the knowledge of its agent and must be deemed to have entered upon the transaction at its peril. In such a case it is not material to inquire whether restoration can be made without impairment of its own estate.

Judgment of General Term, af-

firming judgment for plaintiff and denying new trial, affirmed.

Opinion by *Danforth J.* All concur.

## ARREST. ASSIGNEE.

N. Y. COURT OF APPEALS.

*Myers*, sheriff, *applt.*, v. *Becker*, *respt.*

Decided April 15, 1884.

A judgment which leaves to be determined the allowance which an assignee is entitled to have deducted from the gross sum which he holds under a fraudulent assignment is not final. Final judgment should be entered after order made confirming the report of the referee appointed to ascertain the amount of such allowance, and such judgment can be enforced by execution and not by precept to arrest the assignee. No right to issue a precept can be acquired by omitting to enter final judgment.

The provisions of Chap. 8, Tit. 13, Pt. 3, R. S., do not apply to a case where money has been ordered to be paid by a final judgment.

Affirming S. C., 17 W. Dig., 83.

This was an action upon a bail bond taken by plaintiff's predecessor in office, for an escape which occurred during plaintiff's official term. It appeared that P. & Co. made a general assignment to B. In May, 1878, H. et al., judgment creditors of P. & Co., commenced a creditor's action against P. & Co. and B., to set aside such assignment. An answer was put in and the case was referred and a judgment rendered for plaintiff, October 17, 1878, adjudging the assignment fraudulent as against the creditors of P. & Co., and that it was null and void, and the assignee should account for the assigned property which came into his hands, which

was found to be of the value of \$3,000; that a receiver should be appointed of the property in the hands of P. & Co. and of the assignee, and from the proceeds of such property the receiver should first pay the costs of that action, taxed at \$100.07, and from the remainder pay the plaintiffs therein for their judgment against the assignors, \$178.35, with interest from February 5, 1878, and that he report the remainder with his proceedings to the court for and subject to its further order and direction.

On November 8, 1878, an order was made appointing a receiver, and the assignee was ordered to account to him and pay over all the property of the assignors which had come into his hands, which was found to be of the value of \$3,000, and the receiver was ordered to pay out of the property so received by him the two items specified in the judgment, and to report the remainder with his proceedings to the court. A referee was appointed by the same order to take and state the account of the assignee and to determine what costs, expenses, charges, etc., if any, were properly allowable to him to be deducted from the sum of \$3,000. The referee qualified and took an account and made his report to the court, which then made a final order allowing the assignee to deduct from the \$3,000 certain claims allowed to him and directing him to pay the balance, \$2,600, to the receiver. No judgment was entered on this order, but a copy thereof was served on the assignee

and on his refusal to pay over the \$2,610, as required, an *ex parte* order for a precept was obtained under the provisions of the Revised Statutes (Part 3, Chap. 8, Title 13). The precept was issued to the sheriff, who arrested the assignee under it and took the bail bond in suit.

*C. D. Adams*, for applt.

*D. C. Stoddard*, for resp't.

*Held*, That the judgment under which the receiver was appointed was not final; until the final order was made the sum was not ascertained which the assignee was required to pay, and no judgment for any sum of money could be entered or docketed against him, and such judgment should then have been entered and docketed in favor of the receiver against the assignee. The last two orders should have been attached to the prior judgment roll and a final judgment entered thereon. 63 N. Y., 252. Such judgment could have been enforced by execution and not by such process as was issued. Code Civil Proc., §§ 1240, 1241. The provisions of the Revised Statutes under which the precept was issued do not apply to a case where money has been ordered to be paid by a final judgment. 4 Lans., 377; 21 Hun, 288; 23 id., 356; 25 id., 587; 41 N. Y. S. C., 456; 69 N. Y., 536; 77 id., 423.

The plaintiffs in the action in which the receiver and referee were appointed could acquire no right to a precept for the arrest of the assignee by omitting to enter their final judgment. As the precept

for the arrest of the assignee was unauthorized he was illegally arrested and the sheriff had no right to exact or take the bond in suit, and the defendant as surety has not been made liable thereon.

Judgment of General Term, reversing judgment for plaintiff and dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur.

## APPEAL. RAILROAD TAXES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Franklin Hand, Supr., *resp't.*,  
v. The Board of Supervisors of  
Columbia Co. et al., *appls.*

Decided Jan., 1884.

An appeal will lie to the General Term from an interlocutory order overruling or sustaining a demurrer where leave to amend was given, especially where such appeal is taken before any judgment is actually entered.

The fact that the town authorities have paid over only a portion of the taxes assessed and collected of a railroad does not change the duty imposed upon the County Treasurer by Chap. 288, Laws of 1871, nor excuse him from applying the moneys actually received to the purposes specified in the statute, nor does such fact confer any right upon the county to use said money for its own purposes.

Appeal from interlocutory order overruling demurrer to the complaint with leave to answer in 20 days on payment of costs and also from final judgment entered on failure to answer.

It is claimed that the interlocutory order is not appealable.

*Cadman & Hoysradt*, for applts.

*Andrews & Edwards* and *J. Rider Cader*, for resp't.

*Held*, Untenable; that an appeal from an interlocutory order overruling or sustaining a demurrer where leave to amend is given is authorized, especially when the appeal is taken before any judgment is actually entered. Code Civ. Pro., § 1349 and cases cited in Bliss' Code.

This action was brought under Chap. 283, Laws of 1871, by plaintiff as supervisor of the town of New Lebanon. The complaint alleged that the moneys arising from the assessment and levy of the tax upon railroads in said town, except the road and school taxes, for specified years had been paid to defendant H. as County Treasurer and to his predecessor in office; that the moneys so paid to each of them was not used or applied by either of them as required by statute, viz., for the redemption of town bonds, but has been paid over to and been used by the county for its own purposes.

The question raised by the demurrer is, whether the action can be maintained without alleging that the town has paid to the County Treasurer, at least for some years, "all taxes collected" of railroads in said town.

*Held*, That the presumption is that the public officers had duly assessed and collected the taxes and paid all moneys so assessed and collected to the County Treasurer as required by law, and that upon this demurrer the presumption has the same force as the fact. But if there was no such presumption and it was a fact that only a part of the moneys assessed and col-

lected of the railroad had been paid over to the County Treasurer, that should not change the duty imposed upon him by this statute nor excuse him from using and applying so much of such money as he receives to the objects specified in the statute, nor does it confer any right upon the county to use said moneys for its purposes.

The moneys raised in this manner and from this source are set apart by this law for a certain purpose and cannot be devoted to any other without a violation of the statute, whether it be attempted by the Treasurer or the Supervisors of a county. 92 N. Y., 570.

There are no contracting parties in regard to these taxes. The taxpayers of the town have made no contract with the County Treasurer to do a certain thing or to pay him all of certain moneys, and he has made no contract with them that, in consideration of their doing so, he will use and apply these moneys or invest them in a certain manner. They stand in no contract relation.

Judgment affirmed, with costs of appeal, with leave to answer on payment of costs.

Opinion by *Potter, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

#### CONTEMPT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Kate T. Ryckman, *applt.*, v. George W. Ryckman, *respt.*

Decided March 28, 1884.

A party in default may be punished for contempt for failure to pay alimony adjudged by a decree of divorce, but as a foundation to such application the party in default should be served with a certified copy of the decree and payment of the alimony demanded.

Execution cannot properly issue to recover alimony decreed to be paid by a judgment in an action for divorce, but can only issue for costs of the action.

Appeal from order denying motion for the punishment of defendant for non-payment of alimony recovered against him in an action for a limited divorce.

The application to punish for contempt was based simply on the fact that deponent, who was adjudged to pay alimony to plaintiff, had neglected to pay it.

*John H. Hull*, for applt.

*Stephen W. Fullerton*, for respt.

*Held*, That under the authority of *Parke v. Parke*, 80 N. Y., 156, the defendant would be liable to punishment for contempt for refusing to comply with the directions contained in the judgment for the payment of alimony, for it would be a disobedience of a lawful mandate of the court, and as such the proper subject of punishment under a proceeding for a contempt. Code, §§ 14, 2266.

But to subject him to such punishment under the authority of the provisions of the present Code, or of the practice preceding it, a certified copy of the judgment has been required to be served upon him, and a demand for the money made upon him. Code, §§ 1246, 2268. When that has been done a case for an attachment will be made out.

In such an action as this execu-

tion can properly issue only for costs, Code, § 1769, and such being the case an attachment may be issued under § 1241.

But the moving papers failed to show that defendant had been served with certified copy of the judgment or that payment of the alimony money had been demanded and payment refused. For these reasons order affirmed, but without costs, inasmuch as the wife in whose favor the decree was granted is dependent upon the performance of the directions in the decree.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.*, concur.

## JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT..

The Toronto General Trust Co., trustee, *applt.*, v. The Chicago, Burlington & Quincy RR. Co., *respt.*

Decided March 28, 1884.

A cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done, and the place where the cause of action arises is the place where such acts are done or are omitted.

Where the gist of the cause of action between two foreign corporations consists in the wrongful transfer of stock by defendant's transfer agent, which wrongful transfer was made in New York City upon a surrender here of the stock certificates and new certificates issued here to the purchaser, the cause of action arises here, and it is consequently error for the court to set aside a summons served on one of defendant's officers in the City of New York, upon the ground that the court had no jurisdiction of the action.

Appeal from order setting aside the service of a summons.

The action was brought to recover certain stock of the defendant company, or its value, wrongfully transferred on the application of a trustee in whose name the stock stood to a purchaser from such trustee, defendant it is alleged having knowledge that by the provisions of the trust the trustee was wholly without authority to transfer the stock. The stock was originally transferred to the trustee in the City of New York, and was by defendant's transfer agent, the National Bank of Commerce, transferred in the City of New York upon the application of the trustee to a purchaser from him.

*F. H. Pendleton*, for applt.

*Elihu Root*, for respt.

*Held*, That the basis of the cause of action was the wrongful transfer of the stock; that such transfer took place in the City of New York. The acts upon which the claim for the recovery of the stock or reimbursement has been made took place in New York City.

The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done, and the place where the cause of action arises is the place where such acts are done or are omitted. 84 N. Y., 267, 284.

The fact that plaintiff's title to the cause of action was acquired in Canada is not at all controlling.

Under subdiv. 3 of § 1780 of the Code the plaintiff, although a for-

eign corporation, has a right to maintain an action upon the cause of action alleged in this court. The cases 76 N. Y., 365, 7 id., 274, are not inconsistent with this view. The summons was improperly set aside.

Order reversed, with costs to abide event.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

### APPEAL. ARBITRATION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* arbitration of Hiram Pool, *applt.*, and Bartlett S. Johnston, *respt.*

Decided March 28, 1884.

A case on appeal is not required or proper for the purpose of reviewing a judgment entered upon an order confirming, vacating, modifying or correcting an award of arbitrators.

The papers which should be printed upon an appeal to the General Term from such a judgment are the papers which were before the Special Term as the basis of the order authorizing the judgment.

Motion to dismiss an appeal for the default of appellant in omitting to serve papers on appeal.

The appellant answered the motion by showing that he had served a proposed case, and that no amendment had been proposed, and the case had not been settled.

The question presented is whether or not a case is required upon an appeal from a judgment entered upon an order confirming award of arbitrators.

*Miller R. Jones*, for applt.

*Grimball & Tunstall*, for respt.

*Held*, That a case is not required on an appeal from a judgment entered upon an order confirming the award of arbitrators. The former practice still prevails, and the proceeding to confirm, vacate, modify or correct an award is a motion, and from the order entered upon its determination an appeal lies to the General Term, and also an appeal lies from the judgment entered upon such order, and the appeal comes on to be heard upon the papers used upon the motion at the Special Term, and is regulated by the rules applicable to appeals from non-enumerated motions. Code Civ. Pro., §§ 2381, 1353, 2374-75, 2381, 1356, 1361; 24 Barb, 147; 60 id., 150; 30 Hun, 29.

Appeal dismissed, unless appellant prints and serves the papers used before the Special Term within 20 days. But as the practice seems to have been misunderstood, no costs allowed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Margaretta Pfeffele, admrx., *respt.*, v. The Second Avenue R.R. Co., *applt.*

Decided March 7, 1884.

In an action to recover damages for the death of plaintiff's intestate, which was caused by his being thrown from a wagon in a collision with one of defendant's cars, and which collision it was alleged was caused by the negligence of defendant, witnesses were allowed to testify that immediately

after the collision the driver of defendant's car had said that "he could not help it, his brake was broken and out of order, and he could not stop the car." *Held*, Error.

Appeal from a judgment entered on verdict of a jury.

On August 26, 1882, a collision occurred on Second avenue, in New York City, between a wagon driven by plaintiff's intestate and one of defendant's horse cars, and plaintiff's intestate was thrown from his wagon and killed. This action was brought by his administrator, who claimed that the said collision was caused by defendant's negligence, to recover damages for his death. On the trial two witnesses were allowed to state, under objection and exception, that immediately after the collision the driver of defendant's car had said that he could not help it, his brake was broken and out of order and he could not stop the car.

*Austen G. Fox*, for *applt.*

*Samuel Untermeyer*, for *respt.*

*Held*, Error; that evidence almost precisely similar to this was held in 17 N. Y., 131, to be inadmissible, and that case was approved in 51 N. Y., 295, and 54 N. Y., 334.

That, if the evidence had been given in rebuttal after the driver had been examined, and his attention had been called to the declaration, and he had denied having made it, it would have been properly received, but it was not so given, and, therefore, the judgment cannot be sustained.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Daniels, J.*, concurred; *Davis, P. J.*, concurred in the result, but held that what was said in the opinion as to the admissibility of the evidence after the driver had been examined was not correct without the qualification that it could only then be received for purposes of impeachment.

### INJUNCTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William B. Dinsmore, President, *respt.*, v. Emil Augustus Neresheimer et al., *appls.*

Decided March 28, 1884.

A Court of Equity should interfere, when sufficient equitable reasons are presented for doing so, to restrain the prosecution of an unconscionable action, although it may be pending in the courts of another state or country. This may be done by controlling the conduct of the parties when they are subject to the jurisdiction of the court so interposing for the prevention of injustice.

Appeal from order granting an injunction restraining defendants from prosecuting two actions, one for \$7000, and the other for 4000, brought in the Supreme Court of the District of Columbia to recover for the loss of two packages sent by defendants through the Adams Express Company. One was sent from New York to Chicago, and the other from New York to Philadelphia. By the bills of lading, accepted by defendants when the packages were sent, it was provided that in case the value of the package was not given the

liability of the Express Company should be limited to \$50, and in case a value was given to such value. The value was stated upon the delivery of one of the packages to be \$200, and no value was given upon the delivery of the other. All the parties reside in the City of New York. The actions were brought in the District of Columbia, against the Express Company, probably for the reason that it has been held in the Courts of said district that an Express Company cannot limit and restrict its liability for loss as was sought to be done by the provisions of the bill of lading, while the Courts of New York have held that the provisions of the bill of lading constitute a valid contract between the Express Company and the sender, and that the restriction of the liability of the Express Company as therein provided is a proper and valid restriction of its liability. So held in 70 N. Y., 410.

By the actions brought in the District of Columbia defendants seek to recover the actual alleged value of each of the packages, consisting of precious stones, and the present suit is brought to restrain the prosecution of those actions, and the complaint alleges a tender of \$50 and interest to cover the loss of one package, and \$200 and interest, to cover the loss of the other, which sums are deposited in this Court. The Court below granted a preliminary injunction *pendente lite* restraining defendants from prosecuting said actions, pending in the Supreme Court of the District of Columbia.



*John G. Agar and L. M. Fulton,*  
for appls.

*Chas. M. DaCosta and C. M. Seward,* for respts.

*Held,* That the injunction was properly granted. To allow the prosecution of the actions would be oppressive and inequitable, and sanction the perpetration of a fraud upon the Express Company. It is the province of a Court of Equity, and within its powers, to prevent the prosecution of an action, although same is pending in another state or country, where it would be inequitable and oppressive to allow it to proceed. 62 How., 284; 55 id., 283; 45 N. Y., 637; Story's Eq. Jur., § 899; 35 Eng. Law & Eq., 27; 4 Allen, 545; 28 Vt., 470.

Order affirmed, with the usual costs and disbursements.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

## PLEADING. PUBLICATION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Geo. H. Putnam et al., appls.,*  
*v. Gerald J. Griffin, respt.*

Decided March 7, 1884.

A complaint in action commenced in August, which alleges that defendant has abandoned and refuses to perform a contract to buy a certain amount of merchandise from plaintiff during the year ending the following November, does not present a cause of action.

A statement in an affidavit on which an application is made for an order of publication of the summons, that "deponent has not been able to find the defendant within this state, though he has searched and inquired for him at all the places therein where said

defendant would be most likely to be found," does not show that personal service of the summons cannot with due diligence be made within the state.

The fact that an attachment granted in an action has been vacated is no ground for vacating an order of publication subsequently obtained.

Appeal from order vacating order for service of summons by publication.

This action was commenced by obtaining a warrant of attachment on September 13th, 1883, and on October 1st, an order was obtained for the service of the summons by publication. The attachment was vacated on the 17th of Nov., and subsequently a motion to vacate the order of publication was granted, for the reason that the attachment had been vacated.

*Geo. Putnam Smith,* for appls.

*Edward P. Wilder,* for respt.

*Held,* Error; that the attachment need not be contemporaneous with the order, but may accompany or succeed it, Code Civ. Pro. § 638; and, therefore, if the attachment which has been obtained was improperly granted for any reason, that was no ground for interfering with the order of publication. The plaintiff, however, would be under the necessity, under § 707, of suing out an attachment and obtaining a levy of some property by virtue thereof before judgment could be entered.

The complaint in the action was dated Aug. 17th, 1883, and alleged that defendant had abandoned and refused to perform a contract to buy a certain number of books from plaintiff during the year ending the following November; and

it was stated in the affidavit on which the order of publication was granted, that "deponent has not been able to find the defendant within this state, though he has searched and inquired for him at all the places therein where said defendant would be most likely to be found," and it was urged on the appeal, in support of the order appealed from, that the complaint failed to show a cause of action, and the affidavit to show that personal service could not with due diligence be made within the state.

*Held*, That both of these objections to the order of publication were well taken. That the affidavit failed to show that plaintiff had been, or would be, unable, with due diligence, to make personal service of the summons within the state; and that not sufficient was averred in the complaint to show a breach of the contract within the rulings of this Court in *Gray v. Green*, 9 Hun, 334.

Order affirmed.

Opinion by *Davis, P. J*; *Brady* and *Daniels, JJ.*, concur.

#### HUSBAND AND WIFE. CONTRACT.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Alfred B. Dewey, *applt.*, v.  
Sarah M. Durham, *admrx.*, *respt.*

Decided Jan., 1884.

When husband and wife have separated by mutual consent, the wife's agreement to return is a good consideration for a promise by the husband.

Appeal from judgment on referee's report, and from two Special Term orders denying motion for new trial on the ground of newly discovered evidence.

This action involves the title to a bond and mortgage and the avails thereof, which defendant claims as administratrix with will annexed of Maria C. Dewey, plaintiff's deceased wife. The referee found that plaintiff and his wife, after living together for 20 years, agreed to separate for the rest of their lives, plaintiff agreeing to pay his wife \$1,000, which he did by assigning to her the said securities; that after they had lived apart a short time plaintiff agreed that if his wife would return she should retain the securities as her own, and she returned accordingly and lived with plaintiff until her death. The interest on the securities was received by the wife, and the principal was finally paid into the bank to her credit, and was controlled by her until her death. When Mrs. Dewey separated from her husband she promised to give him a bond indemnifying him against her future support, but she did not do so.

*W. L. Sessions*, for *applt.*

*C. D. Murray*, for *respt.*

*Held*, That appellant's challenge of a portion of the finding as against the weight of evidence cannot be sustained.

That, as the contract was fully executed, the wife acquired a valid title to the securities. Her agreement to return was a good consideration for her husband's promise.

24 Hun, 401; *affd.*, 91 N. Y., 381. Equity would have enforced his agreement, prior to the married woman's act of 1848. 7 Johns. Ch., 57. Husband and wife may buy and sell and deal with each other. 61 N. Y., 579; 76 *id.*, 262. A mere naked gift from husband to wife will be sustained, where creditor's rights are not affected. 88 N. Y., 299. The husband waived the wife's failure to give the bond of indemnity.

The ground of alleged surprise is the testimony of certain witnesses that plaintiff promised his wife that the property should be hers if she would return. But the fact of such promise was distinctly averred in the answer. 33 N. Y., 69, 80. Besides plaintiff was examined as a witness in his own behalf in answer to the testimony by which he alleges he was surprised. The newly discovered evidence relates to the same point, and is merely cumulative.

Judgment and order affirmed, with costs, including \$10 costs of one of the appeals from said order and disbursements in both appeals.

Opinion by *Smith, P. J.*; *Har- din* and *Barker, JJ.* concur.

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

John P. Harvey, *applt.*, v. The Village of Little Falls, *respt.*

Decided Jan., 1884.

The complaint averred that defendant is a municipal corporation under the laws of New York, naming its territorial location

and the residence of its officers, and charged neglect of duty and consequential injury to plaintiff's property. *Held*, A good complaint.

Appeal from order sustaining demurrer to complaint with leave to amend in action begun in County Court.

The complaint alleges that defendant is a municipal corporation, duly organized under and by virtue of the laws of the State of New York, and by virtue of such law is, and at the time mentioned in the complaint was, a municipal corporation within the county of Herkimer, and that all its officers are residents of such county; that on October 17, 1879, defendant wrongfully, negligently and carelessly, by its officers, agents and servants, caused and permitted to be left upon Gansevoort street, one of the public streets existing and laid out in said village as, and the same being, a public highway, a large quantity of broken stone, which was deposited and permitted to remain in a large pile upon the traveled portion of said public highway; that on the night of the same day, plaintiff, while proceeding along said highway, as he lawfully might, with his horse and wagon, drove upon and against said quantity of stone, so negligently and carelessly deposited upon said highway, the same being unprotected by any safeguard or designated by any lights or in any other manner, and by the collision with such pile of stone, upon such highway, the wagon of said plaintiff, in which the said plaintiff then was, was

broken and his horse injured and damaged, to his damage \$100; that the claim of damages was presented to the Board of Trustees, and was rejected.

Demurrer on the grounds: 1st, That the facts alleged in the complaint do not show any relation between plaintiff and defendant making defendant liable for the damages therein set forth; 2d, that the facts stated do not establish any liability of defendant to pay; 3d, that the complaint does not state facts sufficient to constitute a cause of action.

The court below sustained the demurrer with leave to amend the complaint on terms.

*H. Clay Hall*, for applt.

*S. L. Seabrook*, for respt.

*Held*, Error. Defendant is under obligation to keep its highways in a safe condition, and is liable for injury to person or property resulting from negligence in that respect. 16 N. Y., 161; 61 id., 507.

The act creating defendant is a public act, and defendant is a public corporation. 5 N. Y., 369; Dill. Mun. Corp., Ch. 4, §§ 29, 30, and cases cited.

Public statutes need not be stated in pleadings. Greenl. Ev., Vol. 1, Ch. 2, §§ 4, 5, 6; 37 N. Y., 174; Chit. Pl., Vol. 1, pp. 214, 215; 57 Barb., 504.

The complaint makes sufficient reference to the statute.

*City of Buffalo v. Hallway*, 3 Seld., 493, and *Mulholland v. Village of Ilion*, Special Term case, not reported, considered and distinguished.

Vol. 19.—No. 3.

Order sustaining demurrer reversed, and demurrer overruled, with leave to answer on payment of costs in court below and of this appeal.

Opinion by *Barker, J.*; *Smith, P. J.*, concurs; *Hardin, J.*, not voting.

### BROKER'S COMMISSIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*James J. Phelan, applt.*, v. *Edward Schell, respt.*

Decided March 7, 1884.

In an ordinary purchase and sale of real estate, when the vendor is simply to execute a conveyance and receive the stipulated purchase price in money or security, the responsibility of the purchaser is of little or no importance, and if he is ready at the proper time and place to make payment and execute and deliver the securities according to the stipulations of the contract of sale a refusal on the part of the vendor to perform entitles the broker who brought about the contract of sale to his commission if he has been guilty of no default on his part leading to the result, but in a case where the contract is for the sale of very valuable property without immediate payment, accompanied by a large loan to the purchaser, who is to procure a further loan and erect upon the property very valuable buildings, the ability of the purchaser to carry out such contract and his responsibility upon failure to answer in damages is a most important element, and a broker who intervenes to bring about such a contract is bound to see that the buyer he produces is able and responsible, and however far the parties may proceed upon the assumption that he is of that character the vendor may refuse to go on whenever, before the contract is consummated by its actual execution and delivery, he discovers that the proposed buyer is pecuniarily unable to perform his contract, and in such a case the broker is entitled to no commissions.

Appeal from judgment entered on verdict and from order denying motion for new trial.

Plaintiff's assignor, who was a real estate agent, negotiated a contract between defendant and one K. for a sale by defendant of real estate owned by him for \$140,000, without immediate payment, accompanied by a loan from defendant to K. of \$160,000; K. to procure a further loan of \$60,000 or \$70,000 and erect a large number of houses on the property. Before, however, the contract was consummated by its actual execution and delivery defendant discovered that K. was pecuniarily embarrassed and he therefore refused to perform the contract. The broker then claimed his commissions and this action was brought to recover them.

*P. & D. Mitchell*, for applt.

*Fellows, Hoyt & Schell*, for respt.

*Held*, That in an ordinary purchase and sale of real estate, when the vendor is simply to execute a conveyance and receive the stipulated purchase price in money or security, the responsibility of the purchaser is of little or no consequence, and if he is ready at the proper time and place to make payment and execute and deliver the securities according to the stipulations of the contract of sale, a refusal on the part of the vendor to perform entitles the broker who brought about the contract of sale to his commissions, if he has been guilty of no default on his part leading to the result; but in a contract like the one under consideration

the ability of the buyer to go on and erect the buildings by investing the money loaned by the vendor and the necessary additional sum to complete them according to the terms of the contract and his responsibility on failure on his part to answer in damages is a most important element, and a broker who intervenes to bring about such a contract is bound to see that the buyer he produces is able and responsible, and however far the parties may proceed upon the assumption that the proposed buyer is of that character the vendor may refuse to go on whenever, before the contract is consummated by its actual execution and delivery, he discovers that the proposed buyer is insolvent or otherwise pecuniarily unable to perform his contract, and in such a case the broker is not entitled to any commissions.

Judgment and order affirmed.

Opinion by *Davis, P. J.*; *Brady, J.*, concurs.

#### COSTS. ATTORNEYS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Henry Naylor, *respt.* v. Barent H. Lane, *applt.*

Decided Feb. 4, 1884.

A defendant may assign to his attorney the prospective costs against plaintiff in consideration of services to be rendered, and the claim of the attorney to a judgment for such costs cannot be defeated by setting off against the same a prior judgment in favor of plaintiff against defendant.

Appeal by defendant from order of Special Term.

A verdict was rendered for defendant, and judgment entered for \$180.63, for costs and disbursements. On the same day the attorney for defendant served on the attorney of plaintiff notice of entry of said judgment, together with a notice of his own lien on said judgment to the full extent thereof for his taxed costs, &c. On the same day and before entry of said judgment, a judgment was entered in this Court in another action in favor of the plaintiff herein, for \$331.66, against defendant and one Bill on a joint and several indebtedness to said plaintiff. A motion was made by plaintiff that the judgment obtained by defendant against plaintiff, in the first mentioned action, should be set off against the judgment obtained by plaintiff in the second action.

In opposition, an affidavit of defendant's attorney was read, setting forth that he had been the attorney for defendant in said action, in which judgment had been recovered in defendant's favor; that he had not been paid for his professional services therein and believes that he will not be paid; that from the time of his employment there had been an agreement that all costs recovered in the action should belong to him, the attorney. The Special Term granted the said motion to set off, and defendant appealed.

*Charles E. Crowell*, for resp't.

*D. A. Hulett*, for applt.

*Held*, That the appeal should be

sustained. The effect of setting off one judgment against the other is that the amount of the judgment in favor of defendant for costs has been paid by plaintiff to defendant, whereas it did not belong to him but to his attorney, as taxed costs, by specific agreement, of which plaintiff had notice. The lien of the attorney on a judgment recovered for the amount of his costs, &c., is well settled, and has been regarded as an equitable assignment of the judgment to him. 51 N. Y., 143; 3 Civ. Pro., 146; 71 N. Y., 443; 70 N. Y., 96. To protect the attorney's lien in the case at bar there was no necessity that notice should have been served on plaintiff. 3 Code Rep., 225. Notice in this case however was given and no settlement of the litigations between the parties themselves by set off or otherwise, which defeated the lien of the attorney, was proper. 4 Code Rep., 143; 8 Daly; 12 W. Dig., 10.

Order reversed and motion denied, with costs.

Opinion by *O'Gorman, J.*; *Sedgwick, C.J.*, concurs, citing 53 N. Y., 240.

## WILLS. APPEAL.

### N. Y. COURT OF APPEALS.

*In re* probate will of Darrow.

Decided April 15, 1884.

Testator, who was a man of sound mind and not readily influenced except through his reason, made his will, by which he made provision for his wife and relatives, and gave a large bequest to F., his attorney. F. had given instructions to one S. to draw a codicil, but by advice of S., without F.'s

knowledge, the will in question was drawn instead. Some of the facts proved on probate of the will were such as might lead to contradictory inferences. *Held*, That the question involved was purely one of fact, and that the decree in favor of the will, affirmed by the General Term, was not reviewable by the Court of Appeals.

It appeared that F., one of the principal beneficiaries in the will of D., was his general counsel and attorney, who gave the instructions upon which the will was drawn by S., another but friendly attorney, and who had a previous opportunity to exert an influence upon the will. F. was not present when the will was executed, and the instructions he gave as coming from the testator were merely to prepare a codicil, and a new will was drawn by the advice and suggestion of S., and without the knowledge of F. The proponents offered to prove the instructions given, but the evidence was excluded on the objection of the contestants. The former will was not produced on the trial. The testator was worth about \$70,000. He was about seventy years of age when he died. He left to his wife, to whom he had been married about a year and a half, \$8,000. Remarks of the testator made near the close of his illness to his wife indicated that he thought she would re-marry. The case does not disclose the character of his relations with his brothers and sisters and the descendants of those who were dead, but the will showed that the testator's attention had been directed to them and a choice made among them, although the provision made for most of them was but slender.

The evidence showed that the testator was of sound mind and memory when he executed the will and not a man to be readily influenced or controlled unless through his reason and sense of justice. Some of the facts proved might lead to contradictory inferences and point to hostile conclusions. The surrogate decided in favor of the will, and his decision was affirmed by the General Term.

*Chas. S. Lester*, for applt.

*L. B. Pike*, for respt.

*Held*, That the question is wholly one of fact and beyond the reach of this Court to review. 88 N. Y. 357; 87 id., 514.

Judgment of General Term, affirming decree of surrogate admitting will to probate, affirmed.

Opinion by *Finch, J.* All concur.

### REPLEVIN.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The American Tool Co., *applt.*,  
v. George J. Smith, *respt.*

Decided March 28, 1884.

A warrant for the collection of a tax is regular on its face although the figures indicating the amount of the tax and the value of the property in the appropriate columns do not have the dollar sign before them, a line in one case and a decimal point in the other separating the figures.

The proper way to proceed in case property seized under a warrant for the collection of a tax is unlawfully replevied is a motion to set aside the replevin proceedings.

Appeal from an order setting aside replevin proceedings.

Certain of plaintiff's property

was seized under a warrant issued by the receiver of taxes to defendant, a marshal, under § 2, Chap. 381, Laws of 1871; § 853 of the Consolidation Act.

The property thus taken was replevined by the sheriff in this suit at the instance of plaintiff.

Defendant moved to set aside the replevin proceedings for the reason that the property was seized by him by virtue of the said warrant issued for the collection of a tax. Plaintiff contended in opposition that the warrant was irregular on its face, for the reason that the figures in the columns giving the value of the property and the tax did not have the dollar sign before them, although such figures were separated in the one case by a decimal point and the other by a line. The court set aside the replevin proceedings.

*W. J. A. Magrath*, for applt.

*Geo. P. Andrews*, for respt.

*Held*, No error; the law supplies the dollar mark for the purpose of expressing the manifest intent.

The omission of the dollar mark does not render the warrant invalid or illegal. 46 Ill., 187; 10 Oregon, 319; 42 Barb., 521.

Order affirmed.

Opinion *per curiam*.

### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Remington Paper Co., *applt.*, v. Anna M. O'Dougherty, *respt.*

Decided April, 1884.

Neither a statutory liability nor a judgment creates a contract upon which attachment will lie.

Appeal from Special Term order vacating a warrant of attachment.

The papers on which the attachment was granted alleged that defendant herein, for her own use and benefit and at her own cost, prosecuted an action in the name of James O'Dougherty, as plaintiff, against Illustrious Remington and others, as defendants, which action resulted in a judgment in favor of defendants and against plaintiff therein for costs. Said James never had any interest in said action, and was, and is insolvent, and an execution issued on said judgment against his property has been returned unsatisfied. Defendants in that action have assigned said judgment and any claim they have therein against said Anna to this plaintiff.

*Elon R. Brown*, for applt.

*James A. Ward*, for respt.

*Held*, It may be conceded that defendant is liable for costs of the former action, Code Civ. Pro., § 3247, yet the case is not one where a warrant of attachment will lie. The remedy can rest only on the ground that the action is one for the recovery of damages for breach of contract, express or implied. Code Civ. Pro., § 635. Defendant is liable only by the provisions of a statute, and there is no express or implied promise. 50 N. Y., 176, 180.

At most, defendant is only liable for costs to the same extent that she would be if the judgment were



against her personally. A judgment is no contract, nor can it be considered in that light. 3 Burr., 1545; 1 Cow., 316, 321.

Order affirmed, with \$10 costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### FALSE REPRESENTATIONS. ARREST.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Frederick Schulz, *respt.*, v.  
Isaac Harris, imple., *applt.*

Decided March 7, 1884.

A false statement made to a commercial agency for use in its business avoids a sale of merchandise which was made in reliance upon such statement, and in an action to recover the merchandise, if in the meantime it has been sold by the defendant, an order of arrest may be obtained upon the ground that the defendant has concealed, removed or disposed of the goods so that they cannot be found by the sheriff and with intent that they should not be so found or to deprive plaintiff of the benefit thereof.

Appeal from order denying a motion to vacate an order of arrest.

This action was brought to recover merchandise sold to defendant, which sale was alleged to have been brought about by false representations made by defendant as to his solvency which avoided the sale.

The false representations relied upon were made to a commercial agency to which plaintiff applied before selling to defendant, and on the faith of whose report the sale was made. Defendant denied that he had made such representations.

Before the commencement of

this action defendant had sold the merchandise sought to be recovered, and the order of arrest was obtained upon the ground that he had concealed, removed or disposed of the goods so that they could not be found or taken by the sheriff and with intent that they should not be so found or taken or to deprive plaintiff of the benefit thereof.

*John H. Post*, for applt.

*Peter Condon*, for resp.

*Held*, That if defendant made false statements to the commercial agency for use by it in its business he must be responsible to those whom it reached and who were influenced by it, and that the right to the order of arrest depended upon the truthfulness of the charge that he made such statements to the agency for use as already mentioned, and upon that issue the evidence was more convincing in favor of his having made them than otherwise, and, having reached that conclusion, there can be no doubt of the propriety of the order. 83 N. Y., 31; 79 N. Y., 495.

Order affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

### TAXATION.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPARTMENT.

J. H. Haight, *respt.*, v. The  
Mayor, &c., of the City of New  
York et al, *appls.*

Decided March 7, 1884.

An error made by the assessors of New York City in giving the names of the owner of the real property assessed is cured by § 5 of Chap. 410, of the Laws of 1867, and such error does not render the assessment void.

Appeal from a judgment of the Special Term.

This action was brought to have certain taxes laid upon certain real estate in the City of New York declared void and the assessment thereof vacated and set aside and stricken from the rolls for the reason that the property was assessed as belonging to "Est. R. K. Haight," which was not the true owner of such property. The Special Term rendered judgment for plaintiff on the authority of *Trowbridge v. Horan*, 28 N. Y., 439.

*E. Henry Lacombe*, for appls.

*J. Alfred Davenport*, for respt.

*Held*, That it is provided by Chap. 302, Laws of 1859, § 7, that the assessors, in imposing the assessment, shall give a detailed statement of the property in their respective wards or districts, together with the name of the owner or occupant, if known; but by § 5 of Chap. 410 of the Laws of 1870, it is declared that no tax or assessment shall be void in consequence of the name of the rightful owner or owners of any real estate in the city not being inserted in the assessment roll or lists.

That in assessing the property to "Est. of R. K. Haight" there was an attempt on the part of the assessors to name the owner, which was a failure, and, therefore, the statute of 1867, *supra*, applied and the assessment was saved. That if there had been no person

named that statute would not cure the defect.

*Trowbridge v. Horan*, 28 N. Y., 439, distinguished.

Judgment reversed, and judgment ordered for defendants.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

## CLOUD ON TITLE. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Peter Masterson, *applt.*, v. Jeremiah A. Cranitch. *respt.*

Decided March 7, 1884.

An action to set aside certain conveyances of real property to defendant as clouds upon plaintiff's title to such property cannot be maintained when it appears that, even if such conveyances were set aside, defendant would still have an undisputed title to the premises in question derived from another and an independent source.

In such an action it can be proved, under an allegation in the answer that subsequent to the conveyances attached the land in question was sold by the sheriff to a third party under a judgment against plaintiff, that defendant has purchased the title of such third party.

Appeal from judgment of Special Term.

This action was brought by plaintiff to remove divers alleged clouds upon his title to certain real estate caused by several tax sales of the same, at which sales defendant was the purchaser of leases of the lots for several long terms of years. In the answers it was alleged that, subsequent to said tax sales, the property was sold by the Sheriff under a judgment against plaintiff to one P., to whom

the sheriff, after the time for the redemption had elapsed, conveyed all the right, title and interest of plaintiff to said P.; and, on the trial, defendant was allowed to prove under the objection and exception of plaintiff that P. subsequently granted and conveyed the same to defendant.

*C. Fine*, for applt.

*J. Townshend*, for respt.

*Held*, That, although it would have been better pleading for defendant to have alleged the facts connecting himself with P.'s title, yet, as the answer gave full notice that P.'s title would be relied upon as a defense, it was not error to allow defendant also to show that that title was vested in him.

That defendant having shown an undisputed title in himself by virtue of the conveyance to him by P. of the title acquired at the sheriff's sale, plaintiff showed no remaining interest entitling him to the judgment prayed for. He should also have proceeded to attack and overthrow the title derived from P., if he could do so, before asking the court to adjudge any of the prior conveyances to be mere clouds upon his title, because, upon the facts shown, defendant had a good title derived from another source, and would not be at all affected by such a judgment, and a court of equity would not feel itself at liberty to try controversies which, if determined in his favor, could result in no practical benefit to plaintiff.

That it was not important therefore to consider the validity of the tax sales attacked in this action,

inasmuch as, assuming those clouds to be removed, plaintiff having no title remaining in the property, and defendant having a good title, assuming the same thing, plaintiff was not at liberty to assert that the tax sales were clouds upon his title.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### TAX DEEDS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Thomas C. Simonton et al.,  
*appls.*, v. Frederick P. Hays  
et al., *respts.*

Decided April, 1884.

The notice of redemption from a tax sale must contain all the specifications pointed out by the statute, and the courts cannot, by a rule of their own, dispense with any of those requirements.

Appeal from judgment on decision rendered at Circuit, on trial by the court without a jury.

Action of ejectment. Plaintiffs claim title under a deed executed by the Comptroller upon a sale for nonpayment of taxes. The only question is as to the sufficiency of the notice to redeem. The notice was given under Laws of 1855, Ch. 427, § 61; and complied with the statute in all respects, except that it did not contain the statement that unless the lands were redeemed by a certain day they would be conveyed to the purchaser. The trial judge held that by reason of such omission the notice did not comply with the

statute, and that the Comptroller's deed was ineffectual to convey any title or estate, and he ordered the complaint to be dismissed.

*D. H. Bolles*, for appls.

*Phelps & Eaton*, for respts.

**Held**, No error. We are not at liberty to speculate as to what would be understood from the notice in its imperfect form. The legislature have seen fit to declare specifically what the notice shall contain, and the proceeding to divest a land owner of his title for nonpayment of taxes is one in which the requirements of law must be strictly observed.

We concur in the views of the presiding judge at Circuit, and of Mr. Justice Barker in *Becker v. Holdridge*, 47 How. Pr., 429.

Judgment affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### TRUSTEES. EVIDENCE. ATTORNEYS.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

*In re* The Commonwealth Fire  
Insurance Co.

Decided March 7, 1884.

All classes of trustees having money belonging to trust estates in their hands are bound to keep the trust funds separate and distinct from their own moneys; and, if deposited in bank for safe keeping, the money should be deposited to the credit of a separate account in their names as trustees; and if this be not done, and the Court can see that by thus mingling the trust funds with their own the trustees have derived any benefit from their use, they are chargeable with in-

Vol. 19—No. 8a.

terest, either simple or compound as the facts developed may require.

The pass books of the trustee at the various banks where he kept his accounts are competent and proper *prima facie* evidence to show that he had mingled the trust funds with his own, and had drawn upon them by his individual check.

An *ex parte* order of the court, made upon the petition of the attorney for a receiver of an insolvent corporation, directing such receiver to pay a certain sum to said attorney for legal services without any investigation as to the value, &c., of such services, is a nullity and may be attacked collaterally on the accounting of the receiver.

Appeal from order confirming the report of a referee to take and state the final accounts of the receiver.

Upon the accounting before the referee herein the contestants, for the purpose of charging the receiver with interest on the moneys of the receivership in his hands during his term of office, offered to prove by his pass books at the various banks where he had kept accounts that he had mingled the trust funds with his own money, and drawn against it, from time to time, by his individual check. The referee excluded this evidence, and held that the receiver could only be charged with interest on the funds in his hands from the time of his last cash payment as receiver.

*J. McDonald*, for applt.

*Henry E. Tremain*, for respt.

**Held**, Error; that all classes of trustees having money belonging to trust estates in their hands are bound to keep the trust funds separate and distinct from their own moneys; and, if deposited in bank for safe keeping, the money should

be deposited to the credit of a separate account in their own names as trustees; and if this be not done, and the court can see that by thus mingling the trust funds with their own the trustees have derived any benefit from their use, they are chargeable with interest, either simple or compound as the facts developed may require. 1 Johns. Ch., 527; 1 Bro., 359; 4 Ves., 620; 1 Johns. Ch., 618; 5 id., 447; 6 id., 17; 4 Paige, 110; 1 Bradf., 356; 32 Barb., 593; 35 N. Y., 191; 45 Barb., 182.

That the appellant, therefore, has the right to show that the trust funds had been deposited by the receiver in bank to his own credit, and that they had been drawn out from time to time upon his individual check, and the bank books were competent and proper *prima facie* evidence bearing upon those questions.

Certain payments by the receiver to his attorney for legal services were attacked as wasteful and excessive. Such payments were made upon orders of the court directing them, and the referee held that he was concluded by such orders and could not question the propriety of the payments made under them. It appears that two of such orders were made *ex parte* upon the petition of the attorney, and without any investigation as to the value of the services alleged to have been rendered.

*Held*, That the said two orders were nullities and could be assailed collaterally by any person sought to be affected by them; and they should not have been re-

ceived in evidence to establish any right to the moneys directed to be paid by them; and it, therefore, devolved upon the receiver to establish that the payments were justified by the services rendered; and the appellants were at liberty to assail the correctness of such payments.

Order modified so as to deny confirmation of the report so far as respected the use of the moneys deposited in the several banks by the receiver, and his liability for interest thereon, and a new reference ordered to take further proof.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### COSTS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jacob Falkel, *respt.*, v. George Moore et al., *appls.*

Decided April, 1884.

Where averments in the complaint before a justice of the peace, make necessary the plea of title, upon which defendant finally succeeds, and plaintiff recovers 12 cents damages upon a cause of action not alleged in his complaint, *Held*, That defendant is entitled to costs.

Appeal from Special Term order denying defendant's motion for retaxation of costs.

Plaintiff complained that defendant's "wrongfully broke, tore down and destroyed" a large quantity of fence on land of which plaintiff was in possession. The answer, besides a general denial, admitted plaintiff's possession of the land and alleged that defend-

ants had a right of way across said land, they to keep the gates or bars of the fences closed when they shall have passed through. The referee found the right of way in defendants, but found that defendants acted unreasonably and wrongfully in leaving the fence open and the rails on the ground, and he held that plaintiff had sustained twelve cents damages.

*M. E. & E. M. Bartlett*, for appls.

*Robert Snow*, for respt.

*Held*, That if plaintiff had declared simply for the cause of action found by the referee, no plea of title would have been necessary or proper, and the cause might have been tried before the justice. The allegation of trespass to real estate makes the plea of title necessary. The "recovery" spoken of in § 3235 of the present Code must be a recovery upon the issue of title. Upon that issue defendants have succeeded. The case is within the rule laid down in *Learn v. Currier*, 15 Hun, 185; 76 N. Y., 625. See, also, 7 How., 74; 35 id., 90; 48 N. Y., 636.

Order reversed, with \$10 costs and disbursements, and motion for retaxation granted.

Opinion by *Smith, P. J.*; *Hardin, J.*, also reads for reversal; *Barker, J.*, not sitting.

## EXECUTORS.

### N. Y. COURT OF APPEALS.

*Adair et al., appls., v. Brimmer et al., exrs., respts.*

Decided Feb. 26, 1884.

On a former appeal the executors A. and B. were held liable for advances made to C., their co-executor, up to a certain date, in excess of his share, to which they had consented, but not for receipts by him after that time, to which they had not consented, and that they should be credited with C.'s share as of the date of the accounting. On appeal from decree readjusting the account, *Held*, that the share of C. as ascertained, should be applied on the portion of this indebtedness for which the other executors were held liable; that in ascertaining the value of such share C. should be credited with the same share of the assets as is credited to the other beneficiaries, and that payments made by him after the date specified should be applied against receipts by him after said date.

Costs incurred after the date of the accounting and commissions thereafter fixed should not be deducted from the amount ascertained to be in the executors hands for distribution where it appears that there is other property to be subsequently accounted for.

Reversing S. C., 15 W. Dig., 421.

In December, 1871, defendants, the surviving executors of W., made application for a settlement of their accounts, and filed with the surrogate their accounts to Dec. 31, 1871. They were referred to G., as auditor, and on Sept. 24, 1876, the surrogate, on the report of G., made a decree finally settling the accounts to Dec. 31, 1871. By the accounts as thus settled the executors were charged with the amount of the inventory and increase and other receipts, and credited with their payments to creditors and legatees, and expenses up to that date, leaving a balance in their hands for distribution, subject to the payment of their commissions and expenses. This decree was appealed from by A. and R., two daughters of the testator. The General

Term adopted the auditor's opinion and affirmed the surrogate's decree, and an appeal was taken by A. and R. to this court on the grounds, 1st, that the auditor and surrogate erred in the manner of ascertaining the amount with which the executors should be charged for the value of certain coal lands in Pennsylvania which they had disposed of in October, 1864, in a manner not authorized by law. 2d. That the executors had been erroneously credited with certain specified items of the account and they had not been charged with a sufficient sum for advances to C. F. W., one of the executors, and sums he had been suffered to draw from the funds of the estate, and for which it was claimed his co-executors should have been held individually liable. These questions were raised by exceptions to the auditor's report and the decree and were specifically passed upon by this court, some being sustained and others overruled. The executors' account was not re-opened, but remanded to the surrogate for the sole purpose of being re-adjusted in conformity with the opinion of this court, which was inserted in and formed part of the remittitur. The facts found by the surrogate were not re-examined, except in respect to the amount found by his decree as the value of the coal lands, and some trifling amounts of payments for interest and exchange. Pursuant to the judgment of this court, the executor's account appears to have been re-adjusted by the surrogate in substantial con-

formity with the directions in the opinion and remittitur. The principal question litigated before him was the amount which could have been realized from the coal lands. Upon this question the auditor found the executors were justly chargeable for the coal lands with \$132,825, with interest from Oct. 10, 1864. The surrogate after reviewing this report and the evidence before the auditor, by his final decree, dated March 6, 1882, reduced this estimate to \$66,412.50, and made a decree settling the accounts on that basis, and in other respects modifying the accounts as directed in the opinion and remittitur from this court. An appeal was taken by A. and R. from that decree. The General Term affirmed the decree in respect to the amount chargeable for the coal lands, but modified it in other respects. A. and R. appealed to this court, claiming that the amount chargeable to the executors for the coal lands should be increased.

*Wm. W. Mac Farland* and *Wm. Henry Rawle*, for appls.

*Joseph W. Choate*, for respts.

*Held*, Untenable; that the decree of the surrogate in this respect was proper.

B., one of the surviving executors, appeals from those parts of the judgment of the General Term which modify the decree of the surrogate by adjudging him and the estate of his co-executor, C. W. W., to be liable for \$213,879.78 of the amount in the hands of the executor, C. F. W., and as adjudged B. is not entitled as against his liability for the ad-

vances to C. F. W., made prior to Aug. 26, 1867, with interest to the date of the accounting, to credit for the entire amount of the share of C. F. W., as finally ascertained on this accounting, less only the amount of the debt due from him to the testator, with interest from the latter's death, and as adjudges B. and the executor of C. W. W. to be liable for \$213,879.78 of the amount in the hands of said executor, without any deduction whatever on account of the share of C. F. W. on the accounting, and as allows to B. and the estate of C. W. W. credit for the amount of the share of C. F. W., as ascertained upon the accounting, less his debt to the testator and interest as against their liability for the advances made to him up to Aug. 26, 1867, with interest to the date of the accounting; and as adjudges that in ascertaining the total amount with which the executors are chargeable as of Dec. 31, 1871, the date of the accounting (which the decree fixes as \$699,969.13), there should be deducted the commissions, costs and counsel fees the decree directs to be paid (amounting to \$52,937.93), by which deduction the several distributive shares are reduced from \$116,661.52 to \$107,838.70; and as adjudges that the several sums received by C. F. W. from his father in his lifetime were not gifts, but constituted a debt or assets chargeable to the executors; and as adjudges that the several payments made by C. F. W. to the executors after Aug. 26, 1867, amounting in all to \$34,878.07 should not

be credited and applied in exoneration of B. against his liability for the advances to C. F. W. made before that date; and as remits the account to the surrogate for readjustment, without directing him to readjust the same by allowing the several corrections claimed by B.

C. F. W. appeals from so much of the judgment as adjudges that the several sums received by him from his father in his lifetime were not gifts, but constituted a debt or assets chargeable to the executors and to be charged to him as part of his distributive share of the estate; and as adjudges that interest is properly chargeable to C. F. W. on said several sums so received by him from his father's estate at the rate of seven per cent. per annum.

It appeared that on the original accounting C. F. W. was charged with \$50,000 and \$14,710.92, as debts due from him to the testator at the time of his death. These debts were included in the inventory filed by the executors and on the settlement of their accounts charged to them as assets which had come into their hands. The same amounts were credited back to them in their account as executors as remaining uncollected. On the former appeal no question was raised as to the fact of the existence of these debts. They were admitted by C. F. W. in his testimony. On the former appeal by A. and R. this court adjudged that these amounts were improperly credited back to the executors as uncollected and should remain in



the account as assets in the hands of C. F. W. and necessary ingredients in ascertaining the total amount of the estate and the amount of each distributive share, independently of the personal liability of the executors, as between themselves to the legatees, which question was separately disposed of. When the account was remanded to the surrogate he conformed to the decision of this court in that respect and left this indebtedness of C. F. W. of \$64,710.92 in the account as settled by the auditor and charged it to C. F. W. in reduction of his distributive share. No appeal was taken by B. or C. F. W. from this decree to the General Term. B. and C. F. W. now contend that the testimony on the second hearing before the auditor and surrogate disclosed that the two sums of \$50,000 and \$14,710.92 were not debts of C. F. W., but gifts to him.

*Held*, That none of the questions presented by the appeals of B. and C. F. W. in relation to said two sums can be raised on this appeal. In so far as the decree affirmed the existence of the debts the adjudication of the surrogate became conclusive as to them. The only duty the surrogate had to perform under the decision of this court was to apply the debts in reduction of the amount to be credited to C. F. W. for his share of the estate.

On the former appeal it appeared that C. F. W., one of the executors, had received funds of the estate largely in excess of his share thereof and that he was insolvent,

whereby a loss had been sustained by the estate. Before the auditor the contestants claimed that the executors should be charged with all payments and lawful interest thereon made to the legatees and devisees, C. F. W. and C. W. W., or either of them, in excess of what they were respectively entitled to receive under the testator's will. After a full investigation the auditor determined that the advances to C. F. W. up to August, 1867, were made by the executors on the credit of his one-sixth of the estate, and that his co-executors having acquiesced in them were ultimately responsible to the other beneficiaries to make them good if the interest of C. F. W. was insufficient for that purpose, but that for the money which went into his hands after that date, to his appropriation of which they had not consented, they were not responsible. This was confirmed by the surrogate, but by the final decree, which was affirmed at General Term, all advances to C. F. W. were credited by the executors as uncollected assets and charged to him individually. This court affirmed the decree but held that executors should be credited only with the distributive share C. F. W. appeared to be entitled to at the date to which the accounts were brought down (Dec. 31, 1871), and that the executors were liable to account as of that date for all sums paid over by them or by their authority to C. F. W. in excess of the amount then due him in his own right, and that this excess could not be

applied in anticipation of the value of his share of the real estate on a future partition thereof; so much of the indebtedness of C. F. W. existing in August, 1867, in excess of his share at the time of the accounting (Dec. 31, 1871), B. should be held liable for with the other executors as of that date, and in ascertaining the share of C. F. W. the amount due from him to the testator at the time of his death, \$64,710.92, with interest, should be first deducted from his distributive share. The General Term modified the decree of the surrogate by charging B. with full amount of the advances to C. F. W. up to Aug. 26, 1867, holding that the balance due to Dec. 31, 1871, on the share of C. F. W. should be applied on his indebtedness to the estate incurred after August, 1867.

*Held, Error*; that the excess of the drafts of C. F. W. beyond his share was the only subject of dispute. For that part which had accrued prior to August 26, 1867, the co-executors were held personally liable, but for that which accrued after that day they were held not liable. As to that part of his excessive drafts, C. F. W. alone was liable, and if he was unable to respond, the loss fell upon the estate. The co-executors were held justified in allowing him to receive and retain funds of the estate up to the amount of his share, and their liability did not begin until he had exceeded that amount.

*Also held*, That in ascertaining the interest of C. F. W. he should be credited with the same share of

the amount charged to the executors as of October, 1864, for the coal lands, as is credited to the other beneficiaries.

The General Term modified the surrogate's decree by deducting from the amount ascertained as remaining for distribution Dec. 31, 1871, costs and counsel fees incurred after that date, and the commissions of the executors thereafter fixed. It appeared that other property remains to be subsequently accounted for.

*Held, Error*; that the surrogate properly settled the account in that respect.

Payments made to C. F. W. after Aug. 26, 1867, were properly applied against receipts by him after that date, for which he alone was responsible.

Judgment of General Term, so far as it reverses or modifies decree of surrogate, reversed and decree of surrogate affirmed, costs of the contestants and B. to be paid out of the estate.

Opinion by *Rapallo, J.* All concur.

## APPEAL. EXTENSION OF CONTRACT.

N. Y. COMMON PLEAS. GENERAL TERM.

Faustine Schmidt, *applt.*, v. B. M. Cowperwaite et al., *respts.*

Decided March 14, 1884.

Where there is no motion in the court below for a new trial on the minutes, and no appeal from an order denying the same, the only questions coming up for review are those presented by the exceptions taken on the trial.

The time of the payment of money provided for by a written instrument may be extended by parol.

What constitutes a valid extension

Defendants, by written instrument, leased to plaintiff certain articles of household furniture for seventeen and a half months at a reserved rent of \$184.20, \$30 in cash, receipt of which was acknowledged, and the balance, \$154.20, in payments of \$9 on the last day of each and every month thereafter during the term of the lease. In case of default, defendants reserve the right to take said furniture, and retain all moneys received by them as liquidated damages. It was further provided that if, at any time during the term of the lease or at its expiration, plaintiff should desire to purchase the furniture, defendants would sell the same to her upon the payment of such sum as would with previous payments of hire amount to the sum of \$184.20, and that no title thereto should vest in plaintiff until said last named sum should be fully paid. Plaintiff took possession of the property, but thereafter defendants claimed possession of it on account of default in the payments of hire. At plaintiff's request, on May 22, 1882, D. saw defendants, who agreed to accept D.'s personal responsibility for a weekly payment of \$2 every Monday, and that there would be no trouble about the goods. On May 27, 1883, and previous to the Monday upon which the first weekly payment of \$2 was due, defendants took possession of and removed the property. Plaintiff

sued for its recovery and damages and obtained a verdict in her favor, which was set aside by the General Term of the City Court, and a new trial ordered in the action, from which order plaintiff appeals.

*M. L. Marks*, for applt.

*J. A. Taylor*, for respt.

*Held*, That, as there was no motion made in the Court below for a new trial upon the judge's minutes, and no appeal from an order denying the same, the only questions coming up for review are those presented by the exceptions taken upon the trial. That the only exceptions entitled to consideration are those taken upon the refusal to nonsuit, and to direct a verdict for the defendants. They all point in one direction—the modification of the original agreement. If this had no legal effect, then the plaintiff had no right of action, for she did not attempt to show that on May 22, 1882, she had made all the payments according to the term of the lease.

*Further held*, that the testimony as to the arrangement with D. is undisputed, and was a complete answer to the motions for a nonsuit, and for the direction of a verdict. The time of the payment of money provided for by a written instrument may be extended by parol, 1 Hun, 551. Defendants agreed to wait until May 29, 1882, for a first payment upon plaintiff's existing indebtedness, and their forbearance was a sufficient consideration to support the agreement which D.'s testimony went to establish.

Order of General Term reversed,

and judgment of trial term affirmed, with costs.

Opinion by *Larremore, J.*; *Daly, Ch. J.*, and *Beach, J.*, concur.

### BRIDGES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Calvin Surdam et al., comrs., *appls.*, v. Solomon Fuller, comr., *respt.*

Decided Jan., 1884.

In 1879 a bridge, which was part of a highway and which crossed a stream dividing certain towns, was out of repair. The Commissioners of highways of the several towns met and repaired it and settled their accounts upon the basis that plaintiffs' town should bear half the expense and the two other towns each a quarter. Plaintiff discovered that his town should have paid only one-third. He demanded of the defendant his share of the over payment, which was refused. It appeared that the board of Supervisors of defendant's town had taken no action to apportion the expense of the repairs under Ch. 482 of Laws of 1875. *Held*, That plaintiff as commissioner of highways could, under Ch. 225 of 1841 as amended by Ch. 383 of 1857, maintain this action for the amount paid in excess of the legal share of his town.

Plaintiffs are commissioners of highways of the town of Hoosick, Rensselaer County. Defendant is commissioner of highways of the town of White Creek, Washington County. There is a bridge across the Hoosick river crossed by a public highway as a part thereof; the southerly end of the bridge and the highway on the south side of the river are wholly in Hoosick; the northerly end of the bridge and the highway on the northerly side

of the river are partly in White Creek and partly in Cambridge, Washington County: the dividing line passes about the centre of the bridge. In 1879 the bridge was out of repair; the commissioners of the several towns met and agreed to repair it. No agreement was made as to the share of the expense to be borne by each, but all supposed that Hoosick should pay one half and Cambridge and White Creek a quarter. The repairs were made and the commissioners had a settlement as to the moneys paid by each and each paid about in the ratio above stated. Plaintiff now brings this action to recover of White Creek (and a similar action is pending against Cambridge) what Hoosick paid beyond one-third, claiming now that the expenses of the repairs should have been sustained equally by all the towns. The referee decided in favor of defendant.

*D. M. Westfall*, for *appls.*

*R. A. Parmenter*, for *respt.*

*Held*, Error. There was no such settlement between the commissioners as amounted to an account stated. They merely met, heard what each had paid for his town and arranged the balances between each. And there is no question of estoppel. No action has been taken by defendant on the strength of the alleged settlement.

We think that in 1879, at least, the law was that the towns should contribute equally, 55 N. Y., 472; 65 N. Y., 327; 70 N. Y., 434, and that the law was not changed by Ch. 432 of 1875. That act, amend-

ed by Ch. 77 of 1878, is the general act to confer powers of local legislation on boards of Supervisors and is only an authority to them to make a certain appointment of the expense of constructing such a bridge. § 1, Subdiv. 4 & 5. But the Supervisors have not acted, and in such a case we think the old law remains, viz: Ch. 225 of 1841 as amended by Ch. 383 of 1857. By those last-mentioned statutes the duty of repairing this bridge vested in the commissioners of the three towns and the expense was to be shared equally.

A further question is whether this action can be maintained by plaintiffs as commissioners against defendant as commissioner. We think it may be. The law of 1841, as amended in 1857—see § 2, &c.—provides that the commissioners who perform may bring an action against those commissioners who neglect or refuse after written notice to join in such performance. And it is said that defendant did not refuse. But defendant did refuse, on notice, to pay his proper share of the expenses and within the statute we think this was a neglect to repair “within a reasonable time.” To the extent to which he has not paid his share he has neglected.

Judgment reversed, new trial granted, referee discharged, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs; *Potter, J.*, dissents, on the ground that the payment by plaintiffs was voluntary and made with full knowledge of all the facts; that there was an

account stated and settled which was conclusive on the parties until impeached for fraud or mistake.

## WILLS. LEGACIES.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*In re* estate of John A. L'Homedieu, dec'd.

Decided Feb., 1884.

A residuary clause carries all which is not legally disposed of by the will unless a contrary intention is manifested from the will itself.

Appeal from decree of Surrogate of Orange Co., holding that the lapsed legacies went into the residuum. The only question presented is whether a lapsed legacy passes under the general residuary clause of the will.

The facts sufficiently appear in the opinion.

*W. J. Welsh*, for resp't.

*Thos. J. Ritch, Jr.*, for appl't.

*Held*, That the only question presented by this appeal is whether a lapsed legacy passed under the general residuary clause. The testator gave legacies to certain half-brothers and a half-sister, who died before the testator, and thus their legacies lapsed. By the third clause of the will testator gave to one Mary E. Hoyt “all the remainder of my property both personal and real in my possession at the time of my decease not otherwise disposed of in the foregoing will, to her heirs and assigns forever.” This case is not like *Kerr v. Dougherty*, 79 N. Y., 328; in that case there was a residuary

clause which included certain religious corporations which could not take.

The court held that the portion of the residuum which thus failed was undisposed of. It is a settled rule of construction that a residuary clause carries all which is not legally disposed of by the will unless a contrary intention is manifested from the will itself. Such an intention cannot be deduced from the mere absence of words, as that the testator failed to provide for the contingency upon which the lapse was occasioned. A testator is supposed to have given away from the residuary legatee for the sake of the particular legatee. 3 Edw. Ch., 79; 79 N. Y., 328; 88 id., 560.

Judgment affirmed, with costs.

Opinion by *Barnard, P. J.*; *Pratt, J.*, concurs.

### NEGLIGENCE.

#### N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Kathleen Hickey, by guardian, *respt.*, v. John P. Taaffe, *applt.*

Decided Feb., 1884.

It is the general rule that an employee assumes the risks of the employment, but this rule has been changed by Chap. 122, Laws of 1876, as to the employment by any person of a child under the age of sixteen years in any business dangerous to the life and limb of such child.

Appeal from judgment in favor of plaintiff for injuries received while in defendant's employ.

The facts sufficiently appear from the opinion.

*Patrick Keady*, for *respt.*

*G. B. Van Wart*, for *applt.*

*Held*, That it is the general rule that an employee assumes the risks of the employment. 76 N. Y., 125. If the master provides safe implements for the employment he is not liable for injuries sustained by the servant in the course of the employment. This rule governs cases where the means used are of the greatest power. The master is not required to furnish the safest machinery in use. He may select and provide such as he chooses, provided only they are well made, strong and safe. In the present case this rule has been changed by statute. By Chap. 122, Laws of 1876, it is provided that if any person use a child under the age of sixteen years in any business dangerous to the life and limb of such child he shall be guilty of a misdemeanor. It is also in the same act provided that if one who has the care and custody of a child shall wilfully cause and permit the child to be placed in such a situation that its life may be endangered he shall be guilty of a misdemeanor. This act made a new rule of duty in respect to children under the age of sixteen. The plaintiff was fourteen years and four months old. She was employed by defendant and at first was put on an employment suitable to children; then she was put to feed an ironing machine; her duty was to put collars and cuffs so that the machine should take them between large metal rollers, which would by great pres-

sure draw the article between the rollers and by heavy pressure complete the process of ironing. The articles were damp and stretched and of necessity limber. The girl had to take such an article and hold it near enough to the machine to be caught between the rollers. Upon the occasion in question her hand was drawn in between the rollers and destroyed. The duty imposed on the master is not answered solely by a criminal punishment for a misdemeanor. 84 N. Y., 480. A violation of an ordinance of a city restricting rate of speed is there held to be some evidence of negligence, even if the ordinance provided a penalty for its violation. In *Willy v. Mulledy*, 78 N. Y., 310, a private action was given under a law which provided that its violation should be a misdemeanor. The statute then imposed a rule of duty upon the defendant which will sustain an action in favor of any one injured by the violation of it. The negligence upon the part of defendant is absolutely made out if the occupation to which the girl was put fell within the law of 1876. That was a question for the jury. The machine is described minutely; its power is manifest and the manner of operating it fully described. Upon this part of the case the verdict is abundantly sustained. Great stress is put by the appellant upon the question of contributory negligence upon the part of plaintiff. The question is one for the jury, and the age of the child is a fact to be duly considered. Where it

is improper to nonsuit the verdict will be upheld, and a nonsuit in this case would not be permitted. 67 N. Y., 417; 92 N. Y., 289.

The judgment of a child of plaintiff's age is immature. The watchfulness which springs from a sense of danger is not to be expected to the same extent as in persons of mature years. The statute meant to protect them from being exposed to danger for these reasons.

Judgment affirmed, with costs.

Opinion by *Barnard, P. J.*; *Pratt* and *Dykman, JJ.*, concur.

#### CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Florian Friedman et al, applts., v. The Gold & Stock Telegraph Co., resp't.*

Decided Feb., 1884.

A public corporation should make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish; and owes the duty impartially to grant the right to all who comply with its rules to have the privileges furnished.

Appeal from judgment in favor of defendant sustaining demurrer to complaint.

Defendant is a corporation organized under the General Telegraph Act of the State, passed April 12, 1848, to own and maintain telegraph lines.

Plaintiffs are co-partners and dealers in stocks, and brought this action to prevent defendant from depriving them of one of its stock instruments and one of its general

news reporting instruments. The question arises on demurrer to the complaint on the ground that it fails to state a cause of action.

The complaint alleges in substance that defendant is a corporation organized and doing business under and by virtue of the laws of the State of New York in respect to telegraph companies, passed April 12, 1848, and the amendments thereto; that the general route of said lines is from the Stock Exchange in the city of New York, through said city and various other cities; that said defendant was organized and is maintained for the purpose of transmitting and its object is to transmit over such lines, through its stock and general news reporting instruments, "to all persons who hold and to all persons who desire to hold its said stock and news reporting instruments, certain quotations, news and information, which quotations, news and information are owned and controlled by it for the purpose of being so transmitted;" that the defendant threatened to remove such instruments; that plaintiffs were willing to pay any price paid by others for the instruments and to conform to any conditions imposed on others.

The demurrer was sustained by the court.

*Tracy, Catlin & Hudson*, for applts.

*Dillon & Swayne*, for respt.

*Held*. That it is not the correct view of the complaint to assume from it that the company defendant is only to be held responsible

for non-performance of duty specified in §§ 11 and 12 of Chap. 265, Laws of 1848. The duties which the companies are required to perform to the public are therein defined, it is true. The complaint, however, alleges that this telegraph company was organized and is maintained for the purpose of transmitting, and its object is to transmit over its lines "and through its stock reporting instruments and general news reporting instruments, to all persons who hold and to all persons who desire to hold its said stock and news reporting instruments, certain quotations, news and information, which quotations, news and information are owned and controlled by it for the purposes of being so transmitted." Telegraph companies are public; have the right to take land under the laws providing that land may be taken for a public use. The act requires them to transmit dispatches "with impartiality and good faith." For the purpose of applying to a profitable use certain instruments owned by it defendant has applied its line to these instruments whenever required by persons who desire to use the instruments and has entered upon the business of collecting a certain class of news and transmitting it over its wires to the individuals using the instruments. Defendant still remains a public corporation owing the duty impartially to grant the right to all who comply with its rules to have the privileges furnished. That there is no objection appears from



the complaint. Plaintiffs have the instruments, and pay and are willing to pay the price agreed upon or which shall be established. Defendants have no power arbitrarily to take away the instruments by force without default. The case of *Breese v. W. U. Tel. Co.*, 48 N. Y., 132, does not touch a case like this. It is there decided that a by-law requiring important messages to be returned and verified, at half-rates, was not an unreasonable by-law. This case seems to be an entirely new one in the courts of this State.

Upon principles of justice a public corporation should make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish.

The corporation can either be deemed to be requested to furnish to plaintiffs every message transmitted over its wires, or to be a public corporation to do the acts it undertakes to do in the way provided by it, by means of the line erected for a public use.

Judgment reversed.

Opinion by *Barnard, P. J.*; *Pratt, J.*, concurs.

### MECHANICS' LIENS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

George H. Prior, *respt.*, v. John J. White et al., *appls.*

Decided Feb., 1884.

Upon a failure to file with the County Clerk notice of legal steps taken to enforce a mechanics' lien within one year from the date

of filing such lien, as required by the lien statute, an entry made by the clerk to that effect will work a cancellation of such lien notwithstanding an action had been brought within the year to enforce the lien.

The question presented arises under Chap. 478, Laws of 1862, an act for the better security of mechanics and laborers in Kings and Queens Counties. After providing for the lien the act provides for a discharge of the lien "by an entry of the clerk made in the book of liens after one year has elapsed since the filing of the claim, stating that no notice has been given to him of legal steps to enforce the lien." One George W. Melvin filed his notices of claim in due time and commenced proceedings by action to enforce the same within the year required by the lien statute. Subsequently plaintiff, also in due time, filed his claim and brought his action to enforce the same. The action brought by Melvin was stayed until plaintiff's action was decided, for the reason that that action would settle the issue presented by Melvin. The case was tried, but before the trial the year expired and no notice had ever been given to or filed with the County Clerk of Kings County of the commencement of the action to enforce the lien. On December 23, 1880, more than one year after filing said notice, the said clerk made an entry in the book of liens as follows: "No notice filed of legal steps to enforce this lien. December 23, 1880."

The court decided that the lien of said Melvin was properly cancelled, from which judgment this appeal is taken.

*Beebe & Wilcox*, for applt. Melvin.

*A. C. Shenstone*, for respt.

*Held*, That the decision is in accordance with *Mushlitt v. Silverman*, 50 N. Y., 360. The lien law permits an owner to notify the claimant to bring his action to enforce his lien within thirty days after the notice, and upon filing an affidavit of service of this notice and the lapse of the time without an affidavit by the claimant of the commencement of the action the lien shall be cancelled. An action was in fact commenced in time by *Mushlitt* against the owner, but the claimant did not file this affidavit. The Court of Appeals held the lien discharged. The Court says that "when the act declares, as it does, that the lien may be discharged in any one of several methods, the happening of any of the events, or the performance of any of the acts mentioned, operate, *per se*, as a discharge, without the necessity of further acts by any person."

The stay of proceedings in the action of Melvin to enforce the lien did not excuse the omission to file the notice with the clerk of the legal steps taken. That was not a proceeding in the action. The claimant must keep his lien a continuing and existing one before the court is empowered to enforce it. If there had been no stay the notice to the clerk was necessary, and in point of fact the action was tried in the present action.

Judgment affirmed.

Opinion by *Barnard*, P. J.: *Pratt*, J., concurs.

## LEASE. COVENANTS.

N. Y. COMMON PLEAS. GENERAL TERM.

*Andrew J. Thomas*, applt., v. *George L. Kingsland et al.*, respts.

Decided Jan. 21, 1884.

Where a lease contains the lessor's covenant to "put and keep the roof in repair," and does not show an intention that he shall take notice of disrepair from his own observations, he cannot be held liable for damage caused by leakage occurring six months after the tenant went into possession, there being no evidence that the roof was out of repair before that time, unless, prior to the occurrence, the lessor knew or was notified of the condition of the roof.

Appeal from judgment in favor of defendants, and from order denying motion for new trial.

Action for breach of covenant.

Defendants leased to plaintiff the upper part of a certain building, the lease containing a covenant by defendants to "put and keep the roof of said building and premises in good repair during the continuance of said lease." Plaintiff went into possession in May, 1879, and his bill of particulars shows that the roof was out of repair in October, 1879, and there was no evidence that before then it was in disrepair. From the leakage at that time plaintiff was damaged. The Court charged that defendants were not liable if they repaired the roof with reasonable diligence when they were informed that it was in need of mending, to which charge plaintiff excepted, and the jury found for defendants.

*James Flynn*, for applt.

*Taylor & Ferris*, for respts.

*Held*, That the charge was not erroneous.

A covenant to "keep in repair" involves a covenant to put in repair, because unless premises are first put in repair they cannot be kept in repair.

A covenant to "put in repair" carries with it an implied admission that the premises are out of repair; but that admission is not indisputable. Except then for the implied admission, there is no difference between a covenant to "keep in repair" and a covenant to "put and keep in repair." It has been held that where the lessor covenanted "to keep the main walls, main timbers and roof in repair," as the lessor could have no knowledge of the state of the main timbers or roof without notice, the lessee could not maintain action for breach without showing such notice. *L. R.*, 6 Ex. 25. Also, "the lessee must give notice to the landlord to make repairs, unless the lease shows an intention that the lessor should take notice from his own observation. This intention will not be implied where the lease does not give the landlord a right to enter and view the premises." *Sutherland on Damages*, 168. See 10 *Allen*, 119.

Unless the landlord knows that the roof needs repairs, so that notice would be useless, it is reasonable to hold that he is not liable for losses through failure to repair unless he has failed to do what was necessary after he had been notified that repair was required.

Judgment and order appealed from affirmed, with costs.

Opinion by *Van Hoesen, J.*; *Van Brunt* and *Beach, JJ.*, concur.

### EXTRA ALLOWANCE. INJUNCTION. DAMAGES.

N. Y. COMMON PLEAS. GENERAL TERM.

*Howell, respt.*, v. *Miller, applt.*

Decided Jan. 21, 1884.

An extra allowance was awarded to defendant upon the discontinuance of the action by plaintiff, and defendant was thereafter awarded the damages ascertained by him from the obtaining of an injunction by plaintiff, which damages the referee found to consist of the fees of the defendant's attorney, &c., for services in removing said injunction. Upon the coming in of the referee's report the court adjudged that what was given as an allowance should be applied to the payment of the damages from the injunction. *Held*, Error; there being nothing in the order for the allowance showing such an intent.

Appeal by defendant from order of Special Term.

Plaintiff obtained an injunction which was dissolved, and thereafter he applied for leave to discontinue the action, which was granted, and an extra allowance was awarded to defendant. There was nothing in the order granting the allowance which showed that the court intended that defendant should not also recover whatever damages he had sustained by the wrongful obtaining of the injunction. Defendant procured an order of reference for the ascertainment of said damages, and the referee allowed the same, holding that they consisted only of the fees, &c., of his counsel for servi-

ces in removing said injunction. The plaintiff and the sureties upon the undertaking filed exceptions to said report and the court sustained them, and refused to confirm said report.

*A. D. Pape*, for applt.

*Hoes & Morgan, C. P. Crosby* and *H. S. Bennett*, for respt.

*Held*, Error. The law is well settled that the granting of an extra allowance is no bar to the recovery of damages upon an injunction undertaking, unless it is made so by the order granting the allowance. 5 Daly, 390. That defendant may recover damages on the injunction undertaking for the trouble which the injunction has caused him may be taken into consideration when an allowance is applied for, and the court may provide by order that the allowance shall, if accepted, be in satisfaction of defendant's claim for the labor he encountered in getting rid of the injunction, and defendant will be bound by it, unless he procures a reversal on appeal. But unless such an order be made it will not be presumed, nor can it lawfully be assumed that the allowance was intended by the court to be in full satisfaction of defendant's claim upon the undertaking. In this case it appears that the judge thought the allowance was enough to pay defendant for all the labor that was performed in the suit. But he was bound by the judgment of the court that granted the allowance, and could not adjudge that what was given as an allowance should, because it was too large, be diverted from

that purpose and applied to the payment of damages on the undertaking.

Order reversed, with costs and disbursements, and report of referee confirmed.

Opinion by *Van Hoesen, J.*; *J. F. Daly* and *Beach, JJ.* concur.

### NEW TRIAL. WAIVER.

N. Y. SUPERIOR COURT. GENERAL TERM.

*Mathilda Paulitsch, respt., v. N. Y. C. & H. R. RR. Co., applt.*

Decided April 7, 1884.

A motion for a new trial on the ground of objectionable conduct on the part of a juror must be made to the Special Term, either upon a case settled or affidavits, or both, and cannot be entertained upon appeal from a judgment and from denial of a motion for a new trial upon the minutes.

The defendant, by taking the chances of a favorable verdict, with knowledge of an objectionable act of a juror, and without objecting to it in any way, waives whatever objection might have been made thereto.

Appeal from judgment in favor of plaintiff and from order denying motion for new trial.

Action for damages caused by negligence.

Throughout the trial the contention of defendant was that plaintiff did not attempt to get on the car where she stated she did, and that she could not have fallen into the space between the platform of the car and the platform of the station, as she claimed she did, because there was not room enough for her to do so. This was the subject of remark between the counsel

for defendant and the judge while the said counsel was having exceptions to the charge noted, when one of the jurors said: "That was a point that I took a note of. Defendant's counsel stated that it would be very extraordinary if any body could come to the conclusion that a lady of her weight could fall in that space. I went yesterday on a train to Woodlawn constructed in the same way, and I got off the platform and watched the cars when they made a start, and I seen the space here that would probably be three feet by fifteen inches between the two platforms, and a lady taking hold and suddenly jerked and thrown in that way had ample room to fall. It was merely a satisfaction to myself." The judge thereupon said: "That, gentlemen, is a question for you to consider when you get in your room." The counsel for the defendant neither objected and excepted, nor did he make any other motion, and the jury retired. Thereafter the judge consulted with the counsel for both parties, and they not objecting, the jury were recalled, and in the presence of counsel reinstructed substantially as follows, viz.: "One of your number stated that he himself personally examined one of the cars, and in the jury box he stated what was the result of his examination. I have called both of the counsel and speak with their consent. I desire to say to you that you have sworn to find a verdict on the evidence, and what has been discovered by a member of your body is not evi-

dence, and must in no way influence you and it should in no way influence him."

The counsel for defendant again failed to express any dissent. The counsel for plaintiff then offered to withdraw the juror who had made the examination and to take the verdict of the other eleven. The counsel for defendant was silent. The jury then again withdrew and rendered a verdict for plaintiff for \$12,500, and upon being polled each juror answered that such was his verdict.

*Frank Loomis*, for applt.

*C. Fine* and *E. Huerstel*, for resp't.

*Held*, That though the first instruction was erroneous, defendants' counsel acquiesced in it by failure to object or except. Under the circumstances stated the error in the first charge was cured by the subsequent instruction, and any further objection which might have been raised on the part of defendant, on the general ground of prejudice, was waived, whether the conduct of the juror in question be considered as misconduct or as an irregularity. In either case all the authorities are to the effect that defendant, by taking the chances of a favorable verdict with full knowledge of the objectionable act of the juror, and without objecting to it in any way, waived whatever objection might have been made.

Moreover, the point would not have been available to defendant on this appeal even if it had not been waived. True, there is an appeal from an order denying de-

defendant's motion for a new trial in conjunction with an appeal from the judgment. But the motion for a new trial was made on the exceptions taken and on the alleged ground that the verdict was excessive and contrary to the evidence and contrary to law. These grounds did not embrace any question arising upon the act of the juror referred to. So the motion for a new trial was made upon the minutes of the judge. Whereas the motion for a new trial on the ground of objectionable conduct on the part of a juror must be made to the Court at Special Term, either upon a case settled or affidavits, or both.

Judgment and order affirmed, with costs.

Opinion by *Freedman, J.*; *Sedgwick, Ch. J.*, concurs.

#### EVIDENCE. WITNESS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Eliza A. Wilson, *app't.*, v. Eliza A. Munnoz, *admrx.*, *respt.*

Decided Feb., 1884.

A mere averment in an answer that a certain person, who is not a party to the action, is interested in the result is not sufficient to make such person an incompetent witness as to transactions with a deceased party under § 829, Code of Civil Procedure.

Appeal from judgment dismissing complaint.

Action to cancel a mortgage of \$8,500 for want of consideration, Michael K. Wilson and the plaintiff on the 2d of Feb., 1878, conveyed certain real estate to one

George Wilson and he is alleged to have conveyed the same to plaintiff by deed dated Feb. 6th., 1878.

George Wilson executed a mortgage of \$8,500 to Jane Clay, Oct. 2, 1879. The deed from George Wilson to plaintiff was not recorded until Oct. 4, 1881, which was after the death of the mortgagee. Defendant in her answer alleged that the said deed so executed by Michael K. Wilson and plaintiff to George Wilson was upon the understanding that the same was to be held for the benefit of said Michael K. Wilson, and that the same remained under the control of said Michael K. Wilson. The principal question presented on this appeal is whether said Michael K. Wilson, who was called on the part of plaintiff and evidence excluded, was a competent witness to conversations had with defendant's intestate in reference to the validity of the mortgage.

*W. B. Maben*, for applt.

*S. M. Ostrander*, for resp't.

*Held*, That when Michael K. Wilson was offered as a witness by plaintiff, she, plaintiff, was presumably the owner of the premises covered by the mortgage she sought to annul. Plaintiff avers that this mortgage was given without any consideration. Michael K. Wilson was a competent witness to prove this fact. He was not a party. Defendant's ancestor did not derive title to this mortgage through plaintiff or her husband. Michael had no interest in the action. If he was the agent either of plaintiff or of Mrs. Clay,

he was a competent witness. 80 N. Y., 198.

The answer averred that the consideration was a debt of Michael K. Wilson due to Mrs. Clay, but this was unproven in the case. A bare averment of interest in the answer was not sufficient to establish the fact, so as to reject the witness alleged to be interested. The case discloses reasons which might affect the credibility of the witness, but none, I think, to make him incompetent.

Judgment reversed.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs.

#### COSTS.

#### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Seneca Nation of Indians, *respl.*, v. Ira Hawley, *applt.*

Decided April, 1884.

Where defendant has amended his answer upon paying costs and finally succeeds in the cause, he cannot tax the costs so paid against plaintiff.

Appeal from Special Term order denying motion for retaxation of costs.

At the trial, defendant was permitted, on his own motion, to amend his answer on payment of plaintiff's costs accrued after the original answer was served. Subsequently a verdict was rendered which entitled defendant to costs. He included in his bill the same costs he had paid on the amendment. The clerk disallowed those items on taxation, and his action was affirmed by Special Term.

*Allen & Thrasher*, for applt.

*B. F. Congdon*, for resp't.

*Held*, That the items in question were fully disposed of by the order allowing defendant to amend, and they could not be again taxed in favor of either party. 13 Hun, 303.

*Havemeyer v. Havemeyer*, 62 How., 476, distinguished. *Donovan v. Board of Education*, 1 Civ. Proc., 311, criticised.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### NEGLIGENCE.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Susannah H. Dorland, *admrx.*, *applt.*, v. The N. Y. C. & H. R. RR. Co., *respt.*

Decided March 7, 1884.

A person passing along a sidewalk has a right to presume it to be safe, and is bound to no special care, and cannot be charged with negligence for not being on his guard against an unlawful obstruction, nor for not looking for it although it is visible.

In an action to recover damages for the death of plaintiff's intestate, caused by the negligence of defendant, where the only proof on the part of the plaintiff is that defendant made a large hole in a public sidewalk, and left the same improperly guarded at night, and that the next morning the dead body of plaintiff's intestate, who had been seen late the night before in a sober condition, was found in such hole, the complaint should not be dismissed for failure of proof of want of contributory negligence. The question of contributory negligence in such a case should be left to the jury to determine.

Reversing S. C., 18 W. Dig., 51.

Reargument of an appeal from a judgment dismissing complaint.

On the trial of this action the only proof given on the part of plaintiff was that on the morning of the 5th of July, 1880, the dead body of her intestate, who had been seen late the night before in a sober condition, was found at the bottom of a hole in that portion of the planking of a pier on West street, in New York city, which adjoined the street, and which was usually used for the purposes of a sidewalk, which hole had been made by defendant, who was in possession of said pier as tenant, and had been left improperly guarded.

Upon this evidence the trial court dismissed the complaint for the reason that the want of contributory negligence had not been proved, and, on the first argument of the appeal this judgment was affirmed, Davis, P. J., dissenting.

*Culver & Betts*, for applt.

*Frank Loomis*, for respt.

*Held*, That in the case of *McGuire v. Spence*, 91 N. Y., 303, it is declared that a person passing along a sidewalk has a right to presume it to be safe, and is bound to no special care, and cannot be charged with negligence for not being on his guard against an unlawful obstruction, nor for not looking for it although it is visible.

That the intestate, having the right to use the street in the manner indicated, and with an assumption of safety in such use, and such a condition of that part of the highway existing as might have

caused the accident from which death ensued, it would seem from the doctrine in the case of *McGuire v. Spence*, *supra*, that the question of the intestate's contributory negligence was one upon which the jury should properly have passed.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

### PARTNERSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

W. H. Corbit, *applt.* and *respt.*,  
v. Charles P. Corbit et al., *appls.*,  
and James H. McCoon, *respt.*

Decided March 7, 1884.

When several persons enter into an agreement to form a special co-partnership, but do not fulfil the requirements of the law necessary to perfect such a partnership, although the person intended to be created a special partner would be liable to third parties for the debts of the partnership contracted in the ordinary course of business, he is not liable to one of the general partners on a partnership note given to him by the other general partners in consideration of a purchase by them of his interest in the business.

Appeal by plaintiff from a judgment dismissing the complaint as to defendant McCoon, and by defendants Corbit and Jacobson from a judgment recovered against them in favor of plaintiff.

On the 2d of April, 1875, plaintiff and defendants entered into an agreement to create a special partnership, in which defendant McCoon was to be a special partner and the others general partners; but the requirements of



law necessary to create such a co-partnership were not complied with. On the 30th of April, 1875, plaintiff, in form, sold his interest in the business of the co-partnership to the defendants Corbit and Jacobson, who gave him a partnership note in part payment of the purchase price. This note not being paid at maturity, plaintiff brought this action to recover upon it. Defendant McCoon claimed that he was not liable on the note; and the other defendants claimed that, while the transaction was in form a sale, it was not so in reality and that they were not liable.

*Douglas Campbell* and *Fred. R. Lee*, for plff.

*Will. Man*, for defts. Corbit and Jacobson.

*Thomas B. Odell*, for respt. McCoon.

*Held*, That although McCoon did not become a special partner as he was designated in the agreement between the parties, still it appeared from such agreement that it was the intention that McCoon should be a special partner in the firm, and, consequently, that he was not expected to be personally liable for the payment of the note. That this intention is further evident from the fact that the transfer of plaintiff's interest was made to the defendants Corbit and Jacobson, who were the debtors and became liable for the payment of the purchase price, and it could not have been their intention in the making of the note to subject McCoon to a legal liability for the payment of their debt. That while McCoon would,

without doubt, have been liable for all debts created in the business of the firm, he would not be liable upon this note, for it was not such a debt, but was the debt only of the persons to whom plaintiff sold his interest in the firm.

That the complaint as to McCoon was properly dismissed at the trial.

That the claim of the defendants Corbit and Jacobson that the transaction between them and plaintiff was not a sale was not sustained by the evidence.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.*, concur.

## MARRIED WOMEN. LEX LOCI.

N. Y. COMMON PLEAS. GENERAL TERM.

Roderick B. Seymour, *respt.*, v. Maria N. Alden, *applt.*

Decided Jan. 21, 1884.

Defendant, a married woman, executed with her husband a bond secured by a mortgage upon her real estate in New Jersey, where she resided. In this action commenced in this State upon the bond, after the premises had been sold on foreclosure of a prior mortgage, and there was no surplus upon such sale, *Held*, That the contract having been made in New Jersey, by residents of that State, and the mortgage being upon real estate situated there, the laws of that State must govern the contract; and there being no allegations in the pleadings of what the laws of New Jersey are, the common law must be presumed to prevail there and there was therefore no cause of action, the contract alleged being void under the common law.

In January 1883, defendant was seized in fee of certain real estate

in the State of New Jersey, of which State she was a resident. About said date defendant and her husband executed and delivered in New Jersey to one B. a bond for \$2,500, secured by a mortgage upon defendant's said real estate. Subsequently defendant's husband died, and a mortgage upon the premises, prior to the one above mentioned, was foreclosed and the premises sold, and there was no surplus upon such sale. The bond and mortgage given to B. were duly assigned to plaintiff.

This action was commenced in this State upon the bond to recover the amount thereof—the complaint alleging the above facts, and also that defendant charged and intended to charge her separate and individual estate with the payment of said bond.

Defendant demurred to this complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court below overruled this demurrer, and from the order thereupon entered this appeal is taken.

*William Barnes*, for applt.

*J. B. Perry*, for respt.

*Held*, That the decision of the question involved in this appeal depends upon the law which is applied to the pleading. The contract was made in New Jersey by residents of that State; the mortgage was upon real estate in New Jersey, and consequently the laws of that State must govern the contract. There are no allegations in the pleading of what the laws of New Jersey are, and consequently we must determine by the rules of

presumption what the law of the State is. It is claimed that the laws of New Jersey, in the absence of proof to the contrary, must be presumed to be the same as the statute law of this State. I do not find the rule to be thus established, but rather that the common law should be presumed to prevail as it existed prior to the passage of our various statutes. 3 Daly, 288. Applying this rule the complaint does not state any cause of action, the contract alleged being void under the common law.

Demurrer sustained, with leave to plaintiff to amend complaint upon payment of costs of appeal and of the demurrer below.

Opinion by *Van Brunt, J.*; *J. F. Daly, J.*, concurs; *Van Hoesen, J.*, dissents.

#### CONTEMPT. ACCOUNTING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Joseph Naylor, applt.*, v. *Henry Naylor, respt.*

Decided March 7, 1884.

Under § 2272 of the Code of Civil Pro. a referee of the whole issues of an action may make an order to show cause why a party should not be punished for a contempt, returnable either before himself or before the court; and, in the latter event, it is the duty of the court to hear and determine the motion on its merits; and it is error for it to deny the motion on the ground that the referee had power to punish for the contempt and that it is a matter which he should decide.

A referee of the issues in an action between partners for an accounting may make a verbal order that one of the parties file an account. It is not necessary that a formal

order in writing or an interlocutory judgment to that effect should be entered.

In such an action there is no necessity for the referee to order an account of the partnership transactions previous to the time of an actual settlement between the parties, but the party ordered to account has, nevertheless, the right, if it be necessary for the protection of his interests, to go beyond the period named and to furnish an account as a subject for due and thorough consideration in the adjustment of the equities between the parties.

Appeal from order denying plaintiff's motion to punish defendant for contempt.

This was an action between partners for an accounting. All the issues were referred by consent. Plaintiff's attorney moved upon the pleadings and the referee's minutes for an order that defendant account, which motion was granted. The referee, thereupon, verbally directed defendant to file an account of the partnership transactions from the date of a settlement conceded by both parties. Defendant refused to file such account, whereupon plaintiff's attorney obtained from the referee an order requiring defendant to show cause before the court why he should not be punished for contempt. The court denied the motion upon the ground that the referee had power to proceed in the premises, and it was a matter which should have been disposed of by him.

*L. A. Lockwood*, for applt.

*C. E. Crowell*, for respnt.

*Held*, Error, that under § 2272, Code of Civ. Pro., a referee of the whole issues may make an order to show cause, returnable before himself or before the court, why a

party should not be punished for a contempt in disobeying an order made by him; and, if he makes it returnable before the court, it is the duty of the court to hear and decide the motion on its merits.

It was claimed by defendant that he could not be compelled to account until a formal order in writing or an interlocutory judgment to that effect was entered.

*Held*, That the direction given by the referee was equivalent to an interlocutory judgment or decree to the effect stated, and should be obeyed as such.

Defendant also claimed that the referee had no right to order an account from a certain period only.

*He'd*, That partners cannot sue each other for anything relating to their partnership concerns unless there has been a balance struck and an express promise to pay; and this, therefore, leaves the whole matter of the partnership transactions open in an action to have the accounts between the parties settled and passed upon and their respective liabilities to each other determined. All the transactions, except those which have been disposed of by an absolute settlement between the parties, unless the settlement itself is impugned for fraud, are open to investigation. It was unnecessary, therefore, to direct the filing of an account prior to a settlement conceded to have been made between the parties and therefore the order of the referee was proper, but there can be no doubt of the right of defendant, if it be necessary for the protection of his interests, to

go beyond the period named by the referee and furnish an account as a subject for due and thorough consideration in the adjustment of the equities between the parties.

Order reversed, and application remitted to Special Term.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

## RECEIVERS. COMMISSIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* Attorney-General v. The Continental Life Ins. Co.

Decided March 7, 1884.

A person appointed receiver of an insolvent corporation to succeed a former receiver, deceased, is not entitled to charge commissions on the amount in the hands of the former receiver, to the custody of which he succeeds, as for collecting and paying out the same. He is only entitled to commissions on such sum for paying it out.

Appeal from certain portions of an order of Special Term, confirming the report of the referee appointed to pass upon the account of defendant's receiver.

The respondent was appointed receiver of defendant on the death of the former receiver, and at the end of the first six months of his receivership presented his accounts for that period. The matter was referred, and the referee allowed the receiver five per cent. commissions on \$92,700.50 which had come into his hands from the former receiver and had been paid out by him. This allowance was objected to by the appellants.

*Raphael J. Moses, Jr.*, for appls.

*Edward H. Hobbs* and *D. O'Brien*, Atty-Gen'l, for respt.

*Held*, That since the fund upon which full commission was allowed to the present receiver had been paid in and was in the official possession of the former receiver at the time of his decease, it necessarily passes directly to the present receiver on his appointment, and it should not, therefore, again be subjected to the burden of commissions for its collection from the mere fact that the present receiver had acquired it by virtue of his office, for that is not such a receiving of the fund as the law contemplates to make it chargeable with commissions. That it is the service or duty of collecting or gathering together the fund which subjects it to a charge for commissions and not for succeeding to its possession after it has thus been gathered together. That the law contemplates but one commission, which is the entire compensation provided for collecting. That inasmuch, therefore, as the court has possession of this fund, and it was in *custodia legis*, the present receiver was entitled to be compensated as to such fund only for paying it out. That in that respect and to that extent the order should be modified.

Ordered accordingly.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

## WILLS.

N. Y. COURT OF APPEALS.

*Lane, exrx., applt., v. Lane, respt.*

Decided April 15, 1884.

While publication is essential to the validity of a will, it need not be in a particular, or any form of words. It is enough if in some way or mode the testator indicates that the instrument is intended or understood by him to be his will.

Testator, who had a defect of speech rendering him unable to utter words, assented to sending for one W. as a witness to his will. W. was informed by the attorney that he was drawing the will and that they had sent for him as a witness. Testator read over the will, signed it, and handed it to the witnesses to sign. *Held*, A sufficient declaration.

The will of L., plaintiff's testator, was admitted to probate by the surrogate, but his decision was reversed by the Supreme Court and certain issues relating to its execution and the testamentary capacity of the testator were sent to a jury for trial. It appeared that at the time the will was executed L. was in full possession of all his senses. Partial paralysis of the vocal organs prevented him from uttering words, but he could make sounds intelligible to those familiar with him and signs which to some extent all could interpret. He went with his wife and son from his own to the house of N. the scrivener, and there, his wife speaking in his presence, informed N. that L. wished him to draw his will and N. did so, in the presence of L. As he wrote each section he read it aloud to L., who nodded approval each time. Something being said about a witness, N. suggested that W. should be sent for, and L. assenting to this W. was sent for and came before the will was completed, and was introduced to L. and informed by N. that he

was drawing L.'s will and they had sent for him as a witness. After the will was finished L. took the will and read it, and immediately after signed it at the proper place, in the presence of W. and N., who also acted as a subscribing witness. He then shoved the will to N., who signed it and then got up and W. sat down in his chair and signed it. The will was left with N. for several months, when the wife of L. called and got it, saying her husband requested her to do so. N. subsequently met L. and told him about it and asked if it was all right and L. gave him to understand that it was. One of the witnesses swore that when W. came in he did not ask L. if the instrument was his last will and testament and that L. did not say to W. that it was. W. swore that he did not ask L. if it was his last will and testament and L. did not say to him, "Yes, this is my last will and testament." The jury found that the will was not properly declared as to W.

*George B. Bradley*, for applt.

*J. McGuire*, for resp't.

*Held*, Error; that there having been a substantial compliance with the statute it was sufficient. The jury could consider the conduct of the testator, his acts and the circumstances which he created and which surrounded the transaction.

Although publication is as essential to the validity of a will as its execution or other prescribed formality, it is not necessary that the publication should be in a particular, or any form of words. It

is enough if in some way or mode the testator indicates that the instrument the witnesses are requested to sign as such is intended or understood by him to be his will. 26 Wend., 325; 23 N. Y., 1; 25 id., 422; 52 id., 125; 6 T. & C., 78; 62 N. Y., 634; 83 id., 592; 84 id., 663; 91 id., 255; 11 id., 220.

*Mitchell v. Mitchell*, 16 Hun, 57; 77 N. Y., 596, distinguished and explained.

*Also held*, That in a case like the present it is proper to take into consideration the meaning of the attestation clause. 77 N. Y., 369; 10 Paige, 85.

Order of General Term, denying motion for a new trial, reversed and new trial granted.

Opinion by *Danforth, J.* All concur, except *Rapallo, J.*, not voting.

## SHERIFFS. POUNDAGE.

### N. Y. COURT OF APPEALS.

*Flack et al., exrs., applts., v. The State of New York, respt.*

Decided April 15, 1884.

To entitle a sheriff to poundage on an execution he must show either the collection of the moneys called for or some interference with his execution of the process that is equivalent thereto.

An arrest on a body execution does not operate as a satisfaction of the judgment, but simply as a suspension for the time being of other remedies, and hence the sheriff is not entitled to poundage where no moneys are collected and the debtor dies before being discharged.

Affirming S. C., 16 W. Dig., 414.

C., plaintiffs' testator, while sheriff of the county of New York,

received for collection an execution on a judgment in the People v. Tweed for \$6,500,000. This execution was returned *nulla bona*, and an execution was thereupon issued against the defendant's person. C. arrested the defendant December 20, 1876, and retained him in custody until December 31, 1876, when his term of office having expired in pursuance of the statute C. transferred the process with the body of the defendant to his successor. No moneys were collected by either sheriff upon the process and the defendant therein was retained in custody until his death, April 12, 1878. Plaintiffs claim poundage under the statute regulating the compensation of sheriffs.

*A. J. Vanderpoel*, for applts.

*W. A. Poste*, for respt.

*Held*, That plaintiffs were not entitled to recover. To bring the claim of a sheriff for poundage on an execution within the provisions of the statute, it is essential that he show either the collection of the moneys called for or some interference with his execution of the process that is equivalent thereto. 5 T. R., 470; 1 Caines, 192; 56 N. Y., 282; 104 Eng. C. L., 550; 7 M. & W., 463; 2 C. M. & R., 334; 63 How., 167.

*Adams v. Hopkins*, 5 Johns., 252; *Scott v. Shaw*, 13 id., 378; *Ryle v. Falk*, 24 Hun, 255; 86 N. Y., 641, distinguished.

In an action upon the case against a sheriff to recover damages for an involuntary escape, the condition and circumstances of the debtor may be given in evi-

dence in mitigation of damages. 17 Wend., 543; 30 N. Y., 587; 31 id., 257; 1 H. & R., 479. When the sheriff has made himself liable as bail under the Code it is otherwise. 44 N. Y., 162.

An arrest on a body execution does not operate as a satisfaction of the judgment, but simply as a suspension for the time being of other remedies of the creditor thereon. 56 N. Y., 279; 58 id., 475; 2 R. S., 465, Art. 2, Tit. 5, Chap. 6, Part 3.

Judgment of General Term, affirming decision of State Board of Audit disallowing plaintiffs' claim, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

## TAXATION. CORPORATIONS.

### N. Y. COURT OF APPEALS.

The People ex rel. The 23d St. RR. Co., *applt.*, v. The Commissioners of Taxes of the City of New York, *respls.*

Decided April 15, 1884.

In assessing the stock of corporations for the purposes of taxation it is the duty of the assessors to deduct the assessed value of the real estate from the *actual* value of the capital stock.

Where the real estate is situated in the same town, ward, city or county its assessed value may be ascertained from the assessment rolls; if situated in another state or country, or if for any other reason its assessed value cannot be obtained, the price paid for it may be taken as the assessable value.

The capital stock of the relator was \$600,000, worth fifty per cent. above par, viz.: \$900,000. It had paid out and invested in real estate \$515,000. Defendants in as-

sessing its capital stock, deducted \$515,000 from \$900,000 and fixed the amount of the assessment at \$325,000. The relator claims that the real estate item, \$515,000, should have first been deducted from the nominal capital, and to the balance fifty per cent. premium on the stock should be added, thus making the assessment \$127,500.

*John H. Strahan*, for applt.

*James C. Carter*, for respls.

*Held*, That it was the duty of the defendants to deduct from the actual value of the relator's capital stock the assessed value of its real estate. The assessment roll may be made up substantially as follows, viz.: In the first column the name of the corporation; in the second the quantity of its real estate in the town or ward; in the third the actual value of the real estate, and in the fourth the value of the capital stock after making the exemptions and deductions required by Section 3 of Chapter 654 of the Laws of 1853.

Where the real estate is in the same ward or town where the capital stock is assessable or where it is situated in the same city or county, its assessed value may be ascertained from the assessment rolls. If it is situated in another state and country, or if for any other reason its assessed value cannot be obtained, the price paid as the presumed value, in the absence of proof or of any other standard, may be taken as the assessable value.

People v. B'd of Ass'rs, 39 N. Y., 81, limited.

Order of General Term, affirm-

ing order of Special Term, affirmed.

Opinion by *Earl, J.* All concur.

## TRUSTS. LIMITATIONS.

### N. Y. COURT OF APPEALS.

*In re* accounting of Neilly, admrx.

Decided April 15, 1884.

Deceased, in 1828, executed an instrument whereby he acknowledged that he had in possession and held in trust for his sister a certain sum, being the balance directed by her father's will to be paid her by himself and his brothers, on which he agreed to pay interest and portions of the principal as her necessities required. *Held*, That, deceased being a debtor of his sister at the time, his declaration of trust in the instrument could not change the character of his obligation; that upon the death of the sister's husband, in 1840, the claim for the money became vested in her and the Statute of Limitations began to run against her.

It is only where there is an actual, continuing and subsisting trust that a trustee is precluded from setting up the Statute of Limitations.

When a complainant has concurrent remedies in law and in equity, time is as absolute a bar in equity as in law.

The presumption of payment after the lapse of twenty years applies to a simple contract.

Reversing S. C., 16 W. Dig., 28.

In the final accounting of N., as administratrix of W., she, as administratrix of B., a sister of W., presented a claim against his estate founded on a paper executed by W., dated November 4, 1828, which recited that he had in his possession and held in trust for B. \$268, being a balance due her for her proportion of \$1,000 directed to be paid by the will of

their father, "for which sum I promise to pay to my sister legal interest as long as the same remains in my hands, and from time to time, as her necessities may require, advance to her a proportion of the principal moneys, it having been agreed between me and her husband that said money shall remain in my hands in trust for his wife, and for her sole benefit." B.'s husband died in 1840. B. died March 27, 1842. She left no property except household goods and the paper above referred to. N. was then about thirteen or fourteen years old, and from that time until August, 1855, when she was married, lived in the same house with W. N. testified that she found the paper in question in a pocketbook in her mother's trunk after her death. It did not appear that N. made any claim by reason of said paper on W., although he lived some thirty-five years after the death of B. It appeared that B., from 1828 to 1842, the time of her death, resided in the family of W. W. died March 9, 1877, and during that year letters of administration were granted to N. On August 8, 1878, N. was appointed administratrix of B. The claim in question was disallowed by the surrogate on the ground that it was barred by the Statute of Limitations.

This decision was reversed by the General Term, the court holding that instrument of November 4, 1828, was a simple deposit, and that the Statute of Limitations did not commence to run until a demand for the money, and no such



demand having been proved the statute never commenced to run. A final judgment was rendered for the claimant, and the claim directed to be paid out of W.'s estate.

*Thomas Nelson and George W. Weiant*, for applts.

*George H. Forster*, for respt.

*Held*, That the judgment cannot be sustained on the ground of an express trust; that the declaration in the instrument of November 4, 1828, by W., that he held the money in trust for B, he being her debtor at the time, could not change the character of his obligation, nor could any agreement on B.'s part. The effect of the agreement with B.'s husband that the money should remain in trust was only to prevent him from demanding its payment, and this affected only his interest in the debt, and the claim for the money on his death became vested in B., and she was entitled immediately to sue for its recovery, and the statute thereupon began to run against her. It is only where there is an actual, continuous and subsisting trust that a trustee is precluded from setting up the Statute of Limitations. 2 Keene, 749; 4 M. & C., 52; 1 Hare, 594; 7 Johns. Ch., 89. Even if B. might have elected to adopt the agreement made by her husband, and to treat W. as trustee, that would not change the result. When a complainant has a concurrent remedy in a court of equity and in a court of law, time is as absolute a bar in equity as it is in law, 7 Paige, 195; 24 Wend., 587, and in such

case the limitation as to actions applies. 15 N. Y., 505; 34 id., 182.

Courts of equity will not entertain stale demands. 9 Pet., 405, 416; 2 Paige, 193; Perry on Trusts, § 869; 7 Johns. Ch., 93; 2 Cas. in Ch., 44; 2 Verm., 418.

*Payne v. Gardner*. 29 N. Y., 146; *Boughton v. Flint*, 74 id., 476, distinguished.

The presumption of payment after the lapse of twenty years is applicable to a simple contract. 94 N. Y., 381.

Judgment of General Term, reversing decree of surrogate, reversed, and decree of surrogate affirmed.

Opinion by *Rapallo, J.* All concur.

## INTEREST.

### N. Y. COURT OF APPEALS.

*O'Brien*, late sheriff, *respt.*, v. *Young et al.*, *applts.*

Decided April 15, 1884.

A judgment is not a contract or obligation within the meaning of the exception in Chap. 538, Laws of 1879, and draws interest only at the statutory rate although entered before the statute went into effect.

A judgment for \$29,464 in favor of plaintiff was duly entered in the above entitled action Feb. 10, 1877. On Nov. 19, 1883, an execution was issued to the sheriff, instructing and requiring him to levy and collect the amount of the judgment with interest at the rate of seven per cent. per annum from the date of the entry. The judgment contained no direction as to

interest. On Nov. 23, 1883, a motion was made by defendants to restrain the sheriff from collecting interest at a greater rate than six per cent. after January 1, 1880. The motion was denied, and on an appeal to the General Term the order denying the same was affirmed.

*E. S. Rapallo*, for applts.

*Lucien Birdseye*, for respt.

*Held*, Error. Where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract and thereafter as damages for its breach. 8 Wend., 550; 9 id., 471; 43 N. Y., 244; 53 id., 586; 61 Barb., 180; 22 How., U. S., 118; 22 Wall., 170; 100 U. S., 72. After the maturity of such a contract the interest is to be computed as damages according to the rate prescribed by law and not according to that prescribed in the contract. When the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal or until the contract is merged in a judgment.

Where one contracts to pay money on demand "with interest," or to pay money generally "with interest," without specifying time of payment, the statutory rate then existing becomes the contract rate and must govern until payment, or at least until demand or actual default. 68 Me., 80; 67 id., 540. The judgment is not for the purposes of this motion

a contract. There was no *agregatio mentium*. 1 Cow., 316; 50 N. Y., 176; 8 Burr., 1545-1548; 17 Ill., 572; 5 McLean, 172; 33 Ala., 706; 56 id., 56; 9 Port., 669; 35 Cal., 156; 2 S. C., N. S., 226; 109 U. S., 255; 94 N. Y., 641.

When the obligation to pay interest is one merely implied by or imposed by law, and there is no contract to pay except the fictitious one which the law implies, the rate of interest must at all times be a statutory one.

The exception in Chapter 538, Laws of 1879, that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act," applies only to contracts or obligations resting upon the voluntary, mutual agreement of parties. A judgment is not a contract or obligation made between the parties, and only such contracts or obligations are within the exception. 86 N. Y., 401.

Order of General Term, affirming order of Special Term denying motion, reversed, and motion granted.

Opinions by *Earl* and *Andrews, JJ.* All concur, except *Miller* and *Danforth, JJ.*, dissenting.

## WILLS. TRUSTS.

### N. Y. COURT OF APPEALS.

*In re* probate will of O'Hara, deceased.

O'Hara et al., *applts.* v. Dudley et al., *exrs, respts.*

Decided April 15, 1884.

Testatrix bequeathed her residuary estate absolutely in joint tenancy to her executors.

upon whose advice, it appeared, she was seriously dependent. She left a contemporaneous letter to the legatees, directing them to devote the income to certain charities by doling out the interest to persons of their selection, and to devote any surplus to charities to be selected by them. The executors deny any promise or agreement to hold for the benefit of others. *Held*, That the letter and the other facts relieved the executors from the charge of undue influence, and that as the proposed arrangement is an effort to carry out by a secret trust what could not, on the face of the will, be done, the legatees are trustees for the heirs and next of kin.

Reversing S. C., 17 W. Dig., 269.

These are two appeals, one from a judgment of the General Term, affirming a decree of the Surrogate of Kings County admitting to probate the will of O'H., deceased, which it was claimed was obtained by undue influence; the other was from a judgment of General Term, affirming a judgment of Special Term dismissing the complaint in an action in equity, brought by the heirs at law and next of kin of O'H., to set aside and annul the residuary devise and bequest in said will, or to establish a trust, which, failing as to intended beneficiaries, should result to those who otherwise would have taken by descent or distribution. The testatrix gave to her lawyer, doctor and priest, absolutely, but as joint tenants, the bulk of her estate. She was proved to have been superstitious, whimsical, blindly devoted to her church and its ecclesiastics, habitually under the influence of stimulants, and seriously dependent upon the advice of those who became her residuary legatees, but no want of testamentary capacity was shown. Upon

the hearing before the surrogate a letter of instructions addressed to the residuary legatees, contemporaneous with the will and dictating the purpose as well as explaining the reason of the absolute legacy, was produced. This letter showed that the residuary clause was not intended by the testatrix to pass to the legatees any beneficial interest, but that she intended to devote the property thereby bequeathed to certain charitable purposes, which her attorney, one of the legatees, had advised her could only be accomplished by an absolute devise to individuals in whose honorable action she could confide. The executors deny in their answer in the equity action any promise made by them, or any trust accompanying the bequest, or any agreement to hold for the benefit of others. The letter of instructions provided that the three residuary legatees, under pretense of ownership, should dole out the interest of the residuary fund to indeterminate persons of their selection; at the end of said lives to continue that process, making it permanent, and to dispense a possible surplus to any charities they might choose.

*George E. Starr and Samuel D. Morris*, for applts.

*William N. Dykman*, for respts.

*Held*, That the letter of instruction introduced in evidence was such an explanation as the circumstances demanded, and that with the other facts proved relieved the residuary legatees from the charge of having exerted undue influence over the testatrix. As

the agreement, on the faith of which the testatrix acted, cannot be carried out, and is a fraud upon the law, and as it is a declared and admitted effort to accomplish by a secret trust what could not on the face of the will be done, the residuary legatees are trustees for the heirs and next of kin of the testatrix. 3 Eq. Cas., 634; 2 K. & J., 313, 321; 10 Hare, 204; 6 Ves., 63, 65; 80 Pa., 405; L. R., 8 Ch. Div., 430; 2 K. & J., 367.

Judgment of General Term, affirming decree of surrogate admitting will to probate, affirmed. Judgment of General Term, affirming judgment dismissing complaint, reversed and new trial ordered.

Opinion by *Finch, J.* All concur, except *Rapallo, J.*, not voting.

### ASSESSMENTS.

#### N. Y. COURT OF APPEALS.

Chase et al., *appls.*, v. Knowles, *respt.*

Chase et al., *appls.*, v. Steiglitz, *respt.*

Decided April 15, 1884.

While one cannot come in on the foot of a judgment to which he was not a party and ask the same relief which was awarded to the plaintiff in the proceeding in which it was obtained, yet where an assessment is about to be enforced against his property he may have the benefit of a judicial decision in respect to it, especially where the assessment has been declared to be absolutely void.

Chap. 550, Laws of 1880, was not designed to take away any common law right of defense against the enforcement of a void tax or to validate erroneous or void assess-

Vol. 19—No. 4b.

ments, but to incite to diligence the aggrieved taxpayer.

Reversing S. C., 17 W. Dig., 457.

The appellants were parties plaintiff and defendant to an action for the partition or sale of certain real estate, which constituted a part of the premises intended to be affected by an assessment for regulating, grading, &c., Tenth avenue in New York city from 155th street to 194th street, which was, in the matter of Deering, 85 N. Y., 1, held to be invalid on the ground that the improvement for which it was laid was unauthorized and that the officers directing it to be done acted without jurisdiction. At a sale by the referee in pursuance of the judgment in partition the respondent K. purchased part of said premises known as lot 66, and paid a portion of the price. The respondent S. also purchased other lots. It was one of the conditions of sale that all taxes and assessments which at the time of sale were liens or incumbrances on the premises should be paid out of the purchase money. The referee, although requested by the purchasers to pay the assessment above referred to, refused to do so on the ground that it was void and therefore not a lien. K. refused to complete his purchase and a motion was made at Special Term to compel him to do so. The matter was referred to a referee, who reported that the assessment was a lien and that K. should be relieved from his purchase and be refunded the money paid by him and his expenses. This report was confirmed by the

Special Term and the order confirming it affirmed by the General Term, and the referee who made the sale directed to pay the assessments out of the purchase money. S. also applied at Special Term for an order requiring the referee to pay the assessment on the lots purchased by him. His application was denied and on appeal to the General Term the order of the Special Term was reversed and the referee directed to pay the assessment out of the proceeds of sale in his hands. Appeals were taken from the orders of General Term to this court. The assessment was the only objection urged against the title.

*James C. Carter*, for applts.

*Henry Gottgetren*, for respts.

*Held*, That the decision in the *Matter of Deering* is decisive in favor of the appellants, and the point adjudged in that case having been deliberately passed upon by the court of last resort of this State should be deemed settled as to all litigants and to all controversies presenting the same question of law. 1 Kent's Com. (12th ed.), 475, 541; 5 N. Y., 389.

While one cannot come in on the foot of a judgment already rendered, and to which he was not a party, and ask such relief as had been given to the suitor upon whose motion it had been rendered, yet where one seeks to enforce an assessment against the property of another, the owner may have the benefit of a judicial finding in respect to it, especially where the assessment is declared to be absolutely void.

Chapter 550 of the Laws of 1880, an "Act relating to certain assessments in the city of New York," and which provides that such assessments "cannot be disturbed, modified or vacated, except in the manner and to the extent provided" therein (§§ 2, 8.) while it limited the effect of existing provisions of law and in terms repealed inconsistent statutes, and declared a short period of limitation within which proceedings might be taken to vacate or reduce assessments, it went no further. It was aimed at evils tolerated by previous statutes and to incite to diligence the aggrieved taxpayer. It was not designed to take away any common law right of defense against the enforcement of a void tax, or to validate erroneous or void assessments. If such had been the intent of the act it would have been clearly expressed. 2 Cranch, 202; 17 N. Y., 383; 55 id., 361.

Order of General Term, affirming order of Special Term relieving K. from his purchase, reversed, and order of General Term, reversing order of Special Term denying the application of S. to be relieved from his purchase, reversed and order of Special Term affirmed.

Opinion by *Danforth, J.* All concur.

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#### WILLS. EXECUTORS. TRUSTEES.

N. Y. COURT OF APPEALS.

*Hancox v. Meeker*, exr.

Decided April 15, 1884.

By the will of testator the executors were directed to divide the residue of the estate, invest it and apply the income for the benefit of testator's children. A subsequent clause authorized the executors to lease the real estate, receive the rents and after the decease of the widow to sell the same for such prices, &c., as they should deem best for the interest of the estate. *Held*, That the executors were not liable for a failure to sell the real estate before the death of the widow.

Where it appeared that the executors have, since the death of the widow, in good faith, made diligent efforts to sell, and that some of the real estate produces a large income, and there is no proof of unreasonable delay or of a refusal of a fair price, *Held*, That no such mismanagement is shown as would make the executors chargeable with expenditures incurred by reason of the delay in the sale.

The use of plate glass is not of itself evidence that it was unnecessary as being beyond ordinary repairs.

Where a settlement is made annually by a trustee with the *cestui que trust*, with the assent of the parties interested, he may properly retain commissions on the annual income.

The will of W., after making provision for the payment of certain legacies, directed his executors to divide the residue of his estate into eight equal shares and invest the same separately on bond and mortgage or in United States or State securities, and apply the income for the benefit of his children as therein provided. The will gave to the testator's widow the homestead and the income of \$12,000 for life and an annuity to a daughter. It provided for the payment of taxes, &c. After these provisions of the will, occurs this clause: "And I do hereby authorize and empower my said executors to let or lease my real estate, and to receive the rents

and profits thereof, and, after the decease of my wife, to sell and convey the same for such prices and upon such terms as they may deem best for the interests of my estate." Upon an accounting by the executors it was claimed that they were liable for a failure to sell the real estate before the death of the widow.

*Geo. F. Betts*, for applt.

*Theodore F. Jackson*, for respt.

*Held*, Untenable; that taking the various parts of the will together it is reasonable to presume that the testator intended to leave the question as to the sale of the real estate before the death of his widow to the sound discretion of his executors.

The evidence shows that one of the executors died in June, 1877, and another in January, 1879. That the testator's widow died in May, 1878, and that the surviving executor has, since the death of the widow, in good faith, made diligent effort to sell, and that some sales have been made. There was no proof that the delay in selling has been unreasonable or that a fair price has been refused for any of the property, or that the estate has sustained any loss by reason of the failure to sell. It appeared that some of the real estate produces a larger income than could be obtained from any amount realized upon a sale of the same invested as directed by the will. It was not proved that prices could be obtained and terms made which were entirely satisfactory and in accordance with the actual value of the property.

*Held*, That the evidence does not show such mismanagement in reference to the sale of the real estate on the part of the executors as would make the surviving executor chargeable with any expenditure incurred by reason of the delay in the sale.

The executor's account contained a charge for "repairs, plate glass, &c., \$500." This was objected to simply as an improper and unlawful charge against the estate which should not be allowed. It was claimed and held at General Term that the item for plate glass should be charged to the person entitled to the estate in remainder.

*Held*, Error; that the objection could not be raised for the first time on appeal; that the use of plate glass was not of itself evidence that it was unnecessary as being beyond ordinary repairs.

The amount allowed as fees of the auditor and referee was objected to. It did not appear how many days were spent on the hearing or in examining the accounts and preparing the report, or whether any rate of charges was stipulated for.

*Held*, That the contestant should have raised the question by motion to the first judge before whom the accounting was had for a readjustment of the fees upon papers showing that they were excessive and unlawful so that all the facts were presented, or he should have procured a return of such facts. If this had been done the fees would not have been paid until a readjustment of them, and as that was not done the question

did not properly arise upon appeal.

The trustees made an annual distribution of the income of the estate on the anniversary of the testator's death, retaining their commissions and taking receipts for the sum so paid over. The provisions of the will required that the income of the estate should be ascertained and divided annually, and that there should be an annual settlement.

*Held*, That the commissions were properly retained by the executors. 2 Paige, 288; 6 id., 216; 7 id.; 9 id., 467; 1 Bradf., 336.

Valentine v. Valentine, 2 Barb., Ch., 430; Drake v. Price, 5 N Y., 430; Betts v. Betts, 4 Abb. N. C., 317; Morgan v. Hannas, 13 Abb. Pr. (N. S.), 361; Cram v. Cram, 2 Redf., 247; Tucker v. McDermot, 1 id., 321, distinguished.

Where an executor, acting as trustee of an estate where an annual statement of the account is required in order properly to distribute the income, has annually paid over in accordance with the provisions of the will the income of the estate to those who are entitled to the same and taken their receipt therefor, and has never received any commissions on the *corpus* of the estate, it is proper and lawful to make annual rests to determine whether a balance is in the hands of the trustee chargeable with interest or whether the whole income has been paid over, as well as for the purpose of allowing commissions on such annual income. Where a settlement is made annually by the trustee with

the *cestui que trust*, with the assent of the parties interested, no reason exists why the trustee should not retain commissions on the annual income. Upon a subsequent accounting the question as to the correctness of the executors' annual account can be determined as well as whether they are chargeable with interest on any balances in their hands.

The petition here was for an accounting and to compel the surviving executor and trustee to render an account according to law, and that he be required to pay over such sum as shall be found due the petitioner upon such an accounting. The citation was in accordance with the body of the petition.

*Held*, That the accounting to be had involved an examination of the proceedings of the executors from the death of the testator, and so far as it went would be a final adjudication in reference thereto.

Judgment of General Term, modifying and affirming decree of surrogate, reversed so far as it modifies the decree, and decree affirmed.

Opinion by *Miller, J.* All concur.

### INJUNCTION. JUDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Patrick Fullan, *applt.*, v. John Hooper, *respt.*

Decided March 7, 1884.

An injunction will not be granted in an action to set aside a judgment on the ground

that it was fraudulently entered upon a false affidavit of personal service of the summons to restrain the enforcement of such judgment by execution when the time has elapsed within which the judgment creditor could issue execution without leave of the court.

The proper method of attacking such a judgment is by motion to set it aside as a fraud upon the defendant therein and upon the court.

Appeal from order of Special Term vacating an injunction restraining defendant from enforcing a judgment obtained by default against plaintiff by execution or otherwise.

The action was brought to set aside such judgment as having been fraudulently entered upon a false affidavit of personal service of the summons, and plaintiff alleged that no proceedings had been taken to enforce the judgment, and that he had not known of its entry until the commencement of this action.

It appeared that the time within which execution could be issued on the judgment without leave of the court had expired. The court below vacated the injunction for the reason, among others, that plaintiff had a remedy at law by moving to set aside the judgment.

*C. Whitlock*, for applt.

*S. Untermeyer*, for respt.

*Held*, That no reason appeared why plaintiff should not proceed by motion to set aside the judgment for fraud upon him and upon the court; that the delay would be sufficiently answered by the conceded fact that no execution had ever been issued, or other attempt made to enforce the judgment, and that he



had no notice of its entry or knowledge of its existence; that there was no need of an injunction, since, by lapse of time, the plaintiff in the judgment was precluded from issuing an execution without obtaining leave from the court upon notice of motion to plaintiff, and that the pendency of this action to determine the validity of the judgment would be accepted as of course as an answer to such motion, or as a reason for postponing it.

Order affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### JUDICIAL SALES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Margaret Beckenbaugh, *applt.*,  
v. Thomas H. Nally et al.

Decided March 7, 1884.

A purchaser of real property at a foreclosure sale will be relieved of his purchase when it appears that a tenant under a lease of a portion of the property was by its terms entitled to remove a brick building situated thereon when the only notice of the lease given in the terms of sale was that the sale would be made "subject to a lease of the present upland of said property to expire May 1, 1884.

Appeal from order releasing and discharging one Appleby from his purchase of certain premises sold under a judgment of foreclosure, and directing the return to him of the money paid by him under the terms of sale.

The purchaser was relieved from his obligation to complete the sale for the reason that a tenant under

a lease of a portion of the property was by its terms entitled to remove a substantial brick building situated upon the property. The only notice of such lease given in the terms of sale was a statement that such sale would be made "subject to a lease of the present upland of said property to expire May 1, 1884.

*P. & D. Mitchell*, for *applt.*

*Arnold H. Wagner*, for *respt.*

*Held*, That all a purchaser would be required to infer from the statement of the lease in the terms of sale was that the upland portion of the property was subject merely to the right of the continued occupancy of the tenant until May 1, 1884. That fairness to him required that notice should be given that the tenant had the right to remove the building, and as the purchaser made his bid under a misapprehension of a material circumstance affecting the propriety of such bid, it would be inequitable to require him to perform it. 30 Hun, 6; 29 Hun, 434.

*Riggs v. Pursell*, 66 N. Y., 193, distinguished.

Order affirmed.

Opinion by *Daniels J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### CIVIL DAMAGE ACT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Margaret Becker, *respt.*, v. Peter Barnum, *applt.*

Decided Jan., 1884.

On a new trial in county court on appeal from a justice's judgment the case should be tried on the issues formed in the justice's court.

The civil damage act does not require the intoxication to be the direct result of the liquor got of defendant in order to render the latter liable.

Appeal from judgment of county court in favor of plaintiff on verdict of a jury and from order denying motion to set aside verdict and for a new trial.

Action brought originally in justice's court under the civil damage act, the complaint alleging that defendant sold and gave to plaintiff's husband strong and spirituous liquors and caused him to be intoxicated and to neglect and become unable to support his family and that the liquor so sold was the cause of said husband beating plaintiff several times, by reason whereof plaintiff became and was sick, sore and lame.

The evidence tended to show that defendant sold from time to time to plaintiff's husband lager bier which was carried away in a pail; that he drank of it, became intoxicated, and in consequence of it beat plaintiff; that the family was entirely dependent on the husband's labor and its compensation for their support and that such compensation would not any more than support the family.

At the outset of the trial in county court defendant moved to make the complaint more definite and certain and that the causes of action be separately stated. This motion was denied.

*D. M. De Witt*, for applt.

*D. W. Sparling* and *Wm. Lounsberry*, for respt.

*Held*, That the case of course should be tried on the issue formed in the court below and if it were otherwise the decision of the county judge only involved a question of discretion and the appellate court will not review that discretion, except in case of abuse thereof.

*Also held*, That the evidence was legitimate, of more or less cogency and proper to be submitted to the jury, and that the jury was warranted in finding that plaintiff was injured in her means of support to the full extent of the money expended by the husband for beer purchased of defendant.

Defendant requested the court to charge that the intoxication which would make defendant liable must be the *direct* result of the liquor got of him. The court in answer to the request charged that it must be the result "in whole or in part."

*Held*, That the counsel should have corrected the misapprehension of the court, if it was one, or been more explicit, and called the attention of the judge to the precise point he desired changed. But that if he had got the attention of the court to the precise point and the court had refused to charge that the effect of the intoxication must be direct it would not have been error. The statute under which this action is brought makes no such distinction whether the intoxication should be the direct or immediate or slow or remote result of the liquor got

of defendant. Defendant is made liable for acts affecting the person, property or means of support in consequence of intoxication in whole or in part.

Judgment affirmed, with costs.

Opinion by *Potter, J.; Learned, P. J., and Boardman, J.,* concur.

### JUDGMENTS. PUBLIC OFFICER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Sidney P. Nichols, *respt.*, v. Chas. F. MacLean, *applt.*

Decided March 7, 1884.

A person who has been appointed to fill a public office from which another person has been removed by proceedings which are subsequently adjudged, on certiorari, to have been invalid and void, is privy to and bound by such judgment, although he was not a party thereto; and the person so removed can maintain an action against him to recover the salary received by him while holding such office without previously securing a judgment of *ouster* against him in a direct action between them in the nature of a *quo warranto*.

Appeal from judgment in plaintiff's favor, rendered on trial by the court without a jury.

Defendant was appointed a Police Commissioner of the city of New York by the Mayor of said city after the removal by him of plaintiff, who had previously been appointed to such office. The proceedings by which the Mayor had removed plaintiff were subsequently adjudged, on certiorari, to have been illegal and void; and, thereupon plaintiff resumed the office and brought this action to

recover the salary received by defendant during the time such office had been held by him.

It was contended on the part of defendant that he was not bound by the judgment rendered in the certiorari proceedings, since he was not a party thereto, and that this action could not be maintained until plaintiff had secured a judgment of *ouster* against defendant in a direct action between them in the nature of a *quo warranto*.

*Ashbel Green*, for applt.

*John D. Townsend*, for respt.

*Held*, That as defendant's title to the office depended wholly upon the action of the Mayor, he was privy to the certiorari proceedings, and was bound by the judgment by which it was declared that such action was illegal and void, and any claim which he might have had to the position in question was extinguished by such judgment, 73 N. Y., 538; 6 Hun, 142; 6 Abb. Pr., 302; Andrews, 388, et seq.; 5 Burr., 2599, 2610; 5 D. & E., 66, et seq., and that it was not necessary that there should have been a judgment of *ouster* against defendant before plaintiff was entitled to bring this action.

Judgment affirmed.

Opinion *per curiam*, adopting opinion of Lawrence, J., in court below.

### WILLS. LEGACIES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Thomas Defreest, *applt.*, v. Mary Alida Defreest et al., *respts.*

Decided Jan., 1884.

The fact of insufficiency of personal estate to pay a legacy is of but slight significance in charging its payment on real estate if testator is not shown to have been aware of such insufficiency.

Testator left a legacy to plaintiff, gave one-third of the income of the whole of his estate to his widow in lieu of dower and gave the residue to his infant daughter. The will contained no provision for the payment of debts nor any power of sale. On a settlement by the executors two years after testator's death the personal property proved insufficient to pay debts and expenses. It did not appear whether there had been a loss or depreciation of the personal property. *Held*, That the legacy was not a charge on the real estate, but entirely abated.

Appeal from judgment at Special Term.

Action for the construction of the will of John P. Defreest and to have it adjudged that a legacy bequeathed to plaintiff is a charge on the real estate of testator.

The will in question bequeathed to plaintiff the income or interest of \$700 during his life. After bequeathing another legacy testator gave one-third of the income of the whole estate to his wife in lieu of dower and devised the residue of his estate to his infant daughter. There was no provision for the payment of debts or power of sale given to the executors.

Testator died in September, 1863. The will was admitted to probate and the executors qualified in November following. In November, 1865, the executors rendered their final account and were discharged. From such account it appears that the personal property was \$423.21, and the debts, funeral expenses and expenses of administration

amounted to the sum of \$520.84. It was not shown on the trial of this action whether there had been any loss or depreciation of the personal property; not even the inventory being produced.

*E. I. Stiles*, for applt.

*R. H. McClelland*, for respts.

*Held*, That the legacy was not a charge on the real estate, but entirely abated. 85 N. Y., 142; 72 id., 317; 58 id., 335; 47 Barb., 263. It is very familiar law that primarily legacies are to be paid from the personal estate of the testator, and that testators are presumed to intend that legacies bequeathed by them are to be paid from that source; and this presumption will prevail to the extent of a denial or failure of payment of legacies where there is not a sufficiency of personal estate with which to pay them, unless there is a clear intent of the testator manifest in the will and the facts and circumstances surrounding the making of it to charge the payment of them upon his real estate. We think that the will and surrounding circumstances fail to establish such intent in the mind of testator when making the will. The fact of insufficiency of the personal property, if testator was aware of it, would go to show that testator either intended that it should be paid out of the real estate or that he, in the serious business of disposing of all his estate, gave plaintiff a barren legacy. But it is difficult to determine, from the scarcity and kind of evidence found in the case, that testator was aware that there would not be

in the settlement of his personal estate a sufficiency left to pay plaintiff's legacy. The settlement took place two years and a little more after testator's death. Whether there was a loss or depreciation of his personal estate in the meantime we cannot decide, as there was no direct proof on that subject. Testator's estate may have become chargeable with debts which he did not anticipate or was not mindful of when he made his will. The fact of insufficiency of personal estate to pay the legacy is of but slight significance in charging its payment upon the real estate if testator is not shown to have been aware of such insufficiency.

The will makes no provision for the payment of any debts of testator. That may have some bearing on the question whether he owed debts and was aware of them. There is no language used in the will, in words or by construction, making the legacy a charge upon real estate. There is no provision for the sale of the real estate or any part of it for the purpose of paying the legacy. The wife is to have one-third of the income of the *whole* estate in lieu of dower. That would signify that the estate is not to be sold or divided, but to remain as an entirety while she lives.

*Hoyt v. Hoyt*, 85 N. Y., 142, distinguished.

The residuary was an infant daughter, an only child 12 years of age, and the devise to her was not subject to the payment of the legacy and no power of sale was

given to any one, and she could not sell until she was 21 except through the machinery and pursuant to the power of the courts. It cannot reasonably be supposed that a parent meant to subject his infant daughter to this process to carry out the provisions of a will, which the testator, by a few words added to the will, could himself have so easily accomplished.

Appellant now claims that a trust was somehow created for his benefit.

*Held*, That there is nothing in the will or the abatement of the legacy bequeathed by it, or the authorities cited by his counsel, to warrant such a judgment on this appeal.

Judgment affirmed, with costs.

Opinion by *Potter, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

#### AGENCY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Clay Whitely, respt.*, v. *Jane A. Zea, applt.*

Decided Jan., 1884.

There is no reason why an agent may not purchase property, including the subject of the agency, honestly and in good faith, of his principal.

Where the agent purchases of his principal for value, in good faith, before maturity, a promissory note given on the sale made by another agent to the maker of the note, evidence as to a warranty on the sale and a breach thereof is inadmissible.

Appeal from judgment entered on verdict by direction of the court and from order denying mo-

tion to set aside the verdict and for a new trial.

Action upon a promissory note. It appeared by uncontradicted testimony that plaintiff was the general manager and agent at Schenectady of an Ohio firm engaged in manufacturing mowing machines; that one L., an agent of the firm, sold a machine to defendant and took the note in question in part renewal of the original note taken upon the sale; that such note was given to plaintiff by L. before maturity; that plaintiff was authorized, through an agreement with one of the firm, to sell such notes to any one, and was especially authorized to purchase such notes himself and had frequently done so, remitting the price thereof to the firm, and that some thirty days previous to the maturity of the note in question he purchased the same under said agreement and remitted the price thereof and notified them that it was for this note. The firm makes no claim to the note.

*D. M. Chadsey*, for resp't.

*Baker Bros.*, for applt.

*Held*, That these facts worked a transfer of the note from the firm to plaintiff. We perceive no reason why an agent of a principal may not purchase property, including the subject of the agency, honestly and in good faith, of such principal. While making the purchase in that manner he puts aside the relation of agency and acts for himself as principal with his former principal. It is only when he takes advantage of knowledge acquired in the agency or of rights

and benefits arising in the business of the agency and of which the principal is ignorant that the agent will not be permitted to lay aside his character of agent and to deal as principal to the disadvantage, loss or prejudice of his principal. It is for the protection of the principal against a dishonest agent or one who seeks to benefit himself at the expense of his principal that this rule prevails.

Defendant offered proof to establish a warranty on the sale, its breach and the damages sustained by defendant by reason thereof. This was excluded.

*Held*, No error. It has been held on a former trial that the note in question was a promissory note, possessing the qualities of commercial paper. 10 W. Dig., 246. There is no conflict in the evidence on the last trial that this note was transferred to plaintiff before its maturity, and that plaintiff neither at the time of the transfer nor before its transfer had any information or notice that there was any warranty in relation to the mowing machine, or that it did not work to the entire satisfaction of defendant. There was, therefore, no evidence to be submitted to the jury upon the question whether plaintiff purchased the note with knowledge of a warranty of the mowing machine or its breach, nor was there any evidence of facts or circumstances making it the duty of plaintiff to make inquiry in that regard.

Judgment affirmed, with costs.

Opinion by *Potter, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

## INJUNCTION. DAMAGES.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Mary B. Lyon et al., exrs.,  
*appls.* and *respts.*, v. Charles W.  
Hersey et al., *respts.* and *appls.*

Decided April, 1884.

Defendants made several unsuccessful motions before finally succeeding in dissolving an injunction. *Held*, That defendants are entitled to their personal expenses in connection with the last motion only.

Cross appeals from Special Term order modifying and confirming, as modified, the report of a referee appointed to ascertain the amount of damages sustained by defendants by reason of the temporary injunction order granted herein.

Soon after the injunction order was served defendants made an *ex parte* motion to vacate it, which was denied. Soon after, upon an order to show cause, another motion was made for the like purpose, and was denied. Later, defendants prepared new motion papers and obtained a second order to show cause why the injunction order should not be vacated, but before the hearing the parties appeared before the judge and consented that the injunction order be set aside, and an order to that effect was entered accordingly. The referee reported that defendants were entitled to certain sums as counsel fees and personal expenses in contesting the injunction and procuring its dissolution. The Special Term held that defendants were not entitled to expenses of their unsuccessful motions, and

reduced the finding of the referee to the expenses incurred in the last motion.

*Chas. D. Adams*, for defts.

*Geo. W. Smith*, for plffs.

*Held*, That the Special Term decision was right, the rule being that expenses incurred in an unsuccessful effort to dissolve an injunction are not allowable as damages. 88 N. Y., 293. Defendants' personal expenses in connection with the last motion to dissolve the injunction are a part of the damages necessarily resulting from the injunction.

*Edwards v. Bodine*, 11 Paige, 223, distinguished.

On a careful review of the record book, we think none of the objections on either side to the decision at Special Term are well taken, and the order appealed from should be affirmed, without costs of this appeal to either party.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

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SURROGATES. APPEAL.  
PRACTICE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Rebecca Waldo, *applt.*, v.  
Charles Waldo et al. *respts.*

Decided April, 1884.

An appeal from a surrogate's decree is not in proper shape to be heard when the appeal book contains nothing purporting to be a decision of the surrogate stating separately the facts found by him and his conclusions of law.

Appeal from surrogate's decree refusing probate of an instrument

purporting to be the last will and testament of Lucius Waldo, deceased, in which appellant is named as sole executrix.

The proceeding before the surrogate was instituted since Chapter XVIII. of the Code of Civil Procedure went into operation. The appeal book contains nothing purporting to be a decision of the surrogate stating separately the facts found by him and his conclusions of law, with the exception of certain specific adjudications in the decree which cannot be regarded as a substitute for the formal decision required by the Code.

*George T. Spencer*, for applt.

*William L. Hodgman*, special guardian for minors.

*Rumsey Miller*, for respts.

*Held*, That the provisions of Chapter XVIII. are designed to assimilate, as far as practicable, the method of procedure for the review of the decision of a surrogate upon the trial by him of an issue of fact to an appeal from a judgment in a civil action. Upon such a trial the surrogate must file in his office his decision in writing, which must state, separately, the facts found and the conclusions of law. An appeal brings up for review by each court to which the appeal is carried each decision to which an exception is duly taken by appellant, as prescribed in § 2545. We decline to consider the case in its present shape, and allow it to be withdrawn, with leave to either party to apply to the surrogate to make and file his decision in accordance with the

statute (if one has not already been filed) such decision when made and filed may be inserted in the appeal book, and the case may then be brought on for oral argument or submission, as counsel shall prefer.

Mem. by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## CONSTITUTIONAL LAW.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* The Union Ferry Company to acquire title, &c.

Decided March 7, 1884.

Chap. 259, Laws of 1882, which declares that "the pier known and designated as No. 2 in the East River in the city of New York and the land under water lying easterly of the said pier to the westerly side of Pier No. 8 shall after the 15th day of June, 1882, be devoted and set apart for the purposes of additional ferry accommodations for the \* \* \* Union Ferry Company" violates Art. 3, § 18, of the Constitution of the State of New York, providing that the legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever, and is consequently unconstitutional and void.

Appeal from order of Special Term denying the prayer of the petition.

This proceeding was instituted by the Union Ferry Company to acquire title to certain lands under Chap. 259, Laws of 1882.

By § 1 of the said act it was provided that "the pier known and designated as Pier 2 in the East River in the city of New York and the land under water lying easterly of the said pier to the wester-



ly side of Pier No. 3 shall after the 15th day of June, 1882, be devoted and set apart for the purpose of additional ferry accommodations for the ferries operated and running between Whitehall street in the city of New York and Atlantic avenue in the city of Brooklyn, known as the Union Ferry Co."

The proceeding was resisted upon the ground that the act was obnoxious to Art. 3, § 18 of the Constitution of the State, providing among other things that the legislature shall not pass a private or local bill granting to any private corporation, association or individual any exclusive privileges, immunity or franchise whatever.

*Develin & Miller*, for petitioner.

*E. T. Gerry*, for H. T. Gerry.

*John B. Pine*, for E. T. Gerry.

*De Witt, Lockman & De Witt*, for Goelet.

*Hackett & Williams*, for E. A. Varick.

*Jackson & Martine*, for H. De Janon.

*Jno. M. Martin*, for H. Martin.

*Abm. Van Santvoord*, for Eugene Lawrence et al.

*Held*, That the act in question was a private or local bill within the meaning of the Article and section of the Constitution, *supra*. That it was private, in that it conferred all the rights it created upon a single corporation. That it was local, in that it related to specific property in a specified location and had no operation upon any other property or locality in the State.

That the Union Ferry Co. was a

private corporation in the same sense in which railroad and turnpike corporations are private, and that the inhibition of the Constitution, *supra*, was therefore applicable to it, and that the act under consideration undertook to grant to such company the exclusive privilege of acquiring title to and using for ferry purposes the property which it condemned to that use and that that was the granting of an exclusive privilege within the prohibition of the Constitution of the State. That the act was therefore unconstitutional and void.

Order affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

## APPEAL. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Shepherd T. Lippincott, *respt.*,  
v. Fletcher Westray, *applt.*

Decided March 7, 1884.

An appeal from an order denying a resettlement of a prior order does not bring up for review the order proposed to be resettled. The only question such an appeal presents is whether or not the order proposed upon the motion for resettlement should be entered in place of the one already granted.

A motion to set aside an order appointing a receiver in supplementary proceedings is properly made to the court and not to a judge thereof.

When a motion is made and heard at Special Term, and granted or denied by the Special Term, there can be no right to enter the decision as an order of a judge of the court. If the court had no right to make the order entered for want of jurisdiction or otherwise, the error should be corrected by an

appeal directly from the order, and not by a motion for resettlement.

Appeal from an order of Special Term, refusing to resettle an order denying a motion to set aside an order appointing a receiver in supplementary proceedings.

The proposed resettlement consisted in substituting for an order of the Special Term an order of a judge of the court denying the motion without prejudice to a motion to be made at Special Term.

*J. M. Guileau*, for applt.

*G. W. Van Slyck*, for respt.

*Held*, That the appeal from the order denying resettlement did not bring up for review the order proposed to be resettled; that the only question such an appeal presents is whether or not the order proposed upon the motion for a resettlement should be entered in place of the one already granted; that the motion to set aside the order appointing the receiver was properly made to the court and not to a judge thereof, and, when it appears upon the papers that a motion was made and heard at Special Term, there can be no right to enter the decision as an order of a judge of the court; that if the court had no right to make the order entered, for want of jurisdiction or otherwise, the error should have been corrected by an appeal directly from the order entered, and not in the manner taken in this case.

Order refusing resettlement, affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

## CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Thomas J. Pope et al., *respts.*,  
v. Geo. A. Porter et al., *appls.*

Decided March 7, 1884.

A contract to sell Scotch pig iron "to arrive as specified below, subject to the dangers of the sea. 500 tons of Coltness pig iron at \$36 a ton, for shipment, to be due here in April next. 500 tons of Caulder pig iron at \$34 per ton, for shipment, to be due here in March next. Payable on arrival here by four months' note," is not an entire one for the sale and delivery of 1,000 tons of iron to be paid for by a four months' note on the delivery of the whole, but is a divisible one for the sale and delivery of two consignments of iron of 500 tons each, to be paid for on the delivery of each by a four months' note. The failure in the arrival of the consignment to arrive in March would not therefore justify the refusal by defendants to receive and pay for the consignment which arrived in April according to the terms of the contract.

Such a contract cannot be satisfied by the tender, at the proper time, of 500 tons of iron of the kind and quality called for by such contract, but which was bought at the port of arrival.

Appeal from judgment entered on the verdict of a jury and from order denying motion for a new trial on the minutes.

In January, 1880, plaintiffs entered into the following contract with defendants:

"This certifies that we have sold to the following named parties Scotch pig iron, to arrive as specified below (naming the purchasers)—500 tons of Coltness pig iron at \$36 per ton, for shipment, to be due here in April next. 500 tons of Caulder pig iron at \$34 per ton, for shipment, to be due here in

March next. Payable on arrival here by four months' note. \* \* ."

Subsequently this contract was modified by mutual agreement so as to provide that the delivery of the iron therein mentioned should be subject to the dangers of the sea. The Caulder pig iron failed to arrive in March, and on the 1st of April defendants wrote to plaintiffs saying that they would not receive it thereafter.

At that time plaintiffs offered to deliver in performance of their part of the contract 499½ tons of Caulder iron, of the kind and quality required by the contract, then in store in Brooklyn, which they had purchased in New York on the 29th of March. Defendants refused to accept this iron as performance of the contract.

The Coltness iron called for by the contract arrived and was tendered in due season, but the defendants refused to receive it on the ground that the contract was an entire one and had been violated by plaintiffs, and that they were consequently released from their obligations under it. The jury found a verdict for plaintiffs for the whole claim and from the judgment entered thereon defendants appealed.

*G. N. Kennedy*, for applts.

*W. W. Niles*, for respts.

*Held*, That the contract was not an entire one for the sale of 1,000 tons of iron deliverable in the months mentioned and to be paid for on the delivery of the whole by a four months' note, &c., but was a divisible one for the sale

and delivery of 500 tons of Caulder pig iron in the month of March, to be paid for by a note to be given on such delivery, and for 500 tons of Coltness iron to be delivered in April and to be paid for on such delivery by a like note, and that defendants, therefore, were not justified in refusing to receive the second consignment of iron. That defendants had purchased iron for shipment to be due in March, the delivery to be subject to the dangers of the seas, and had agreed to pay for the same in the manner specified on its arrival, and the terms of the agreement did not entitle plaintiffs to the privilege at any time during the month of March to step into the market of New York and buy a like quantity of the same kind of iron and insist upon the receipt of that by defendants as a performance of the stipulation of the agreement. 3 Wend., 112; 4 Com., 123; 35 Barb., 519; 23 Hun, 241.

Judgment reversed and new trial ordered, unless plaintiffs stipulate to deduct from the judgment the amount of damages and interest embraced therein for the Caulder iron, and, if plaintiffs so stipulate, affirmed for the residue.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Hiram York, *plff. in error*, v. The People, *defts. in error*.

Decided Jan., 1884.

The opinion of a witness as to a person's financial standing is inadmissible; the facts must be shown.

Certiorari to review conviction of plaintiff in error for obtaining money by false pretences.

The indictment charged that in January, 1878, complainant was induced to deposit money with the banking firm of Y. & C., on the representation by Y. that he and one C. were copartners in the banking business under that name; that C. was worth from \$50,000 to \$100,000, and that the bank was solvent, sound and good, and that all such representations were false.

On the trial evidence was given tending to show that C. had not at that time dissolved his partnership with Y., which had existed for some years prior thereto. Proof was given tending to show that the representations as to C.'s pecuniary standing were made as alleged. There was no definite proof as to C.'s assets or liabilities at that time, or at the time of his death, in June, 1878.

One B. was called as a witness, and testified that he was conversant with C.'s business, and knew of his real estate and personal estate, and of his bank stock and of his debts, and knew of this in 1877, and up to June, 1878. He also testified that C.'s will was proved; that he was one of the executors; that debts had been presented to him as executor; that the will disposed of real and personal estate, and that the real estate and mortgages were matters of record.

He was asked what, *in his opin-*

Vol. 19.—No. 5a.

*ion*, was C.'s pecuniary standing from October, 1877, to February, 1878, and was allowed, under objection, to answer that he was of opinion that C. was, during such time, insolvent.

*Hamilton Ward*, for plff. in error.

*Geo. W. Loveridge*, District Attorney, for defts. in error.

*Held*, Error; that the opinion of B. was not admissible, and was wholly insufficient to prove what C. was worth in January, 1878. 45 Barb., 216; 7 Hun, 88; 6 Abb. N. C., 131.

*Slingerland v. Bennett*, 6 T. & C., 446, distinguished.

It was very important in this case to establish the financial standing and ability of C. in January, 1878, and the fact was one which might have been proved by satisfactory testimony.

In the course of the charge the standing of C., the evidence bearing upon the representation as to his being worth \$50,000 to \$100,000, and the evidence as to insolvency was referred to, and the jury were left to find that the representation was made, and that when it was made C. in fact was insolvent, and to convict on finding such facts. The evidence of B.'s opinion was thereby made important and influential before the jury, and the erroneous reception of his opinion may have produced the conviction.

Order and conviction reversed and proceedings remitted, with directions for a new trial.

Opinion by *Hardin, J.; Smith, P. J.*, and *Barker, J.*, concur.

## ASSAULT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People, *respts.*, v. Austin Persons, *applt.*

Decided Jan., 1884.

On the trial of an indictment for an indecent assault the complainant was allowed to testify to a conversation between herself and her grandmother in the absence of defendant and that she had not been allowed thereafter to go to defendant's house. *Held*, That the evidence was immaterial and inadmissible.

Assent by the girl, although under ten years of age, may be established as a defense to a charge of indecent assault.

Appeal from judgment of Court of Sessions, affirming a conviction of defendant on a charge of assault and battery.

Complainant was a girl nine years and five months of age at the time of the alleged indecent assault, which was alleged to have occurred on May 18, 1881, and divers days prior thereto. Defendant, who was seventy years old, denied the offense under oath. There was no claim of injury by violence. Complainant was allowed, under objection, to answer the question, "What did your grandmother say when you went home?" She replied: "She asked me what I had done when I was there. I told her. She asked me how long it had been going on. I told her." She was also allowed to answer the question, "Has she allowed you to go there since?" and answered, "She has not."

*E. W. Gardner*, for *applt.*

*O. C. Armstrong*, Dist. Atty., for *respts.*

*Held*, Error. The first question called for a conversation held in the absence of defendant and was inadmissible. It was immaterial what the grandmother said to the witness after the occurrences had taken place which were complained of. The child had suffered no bodily harm of which she was complaining at the time of the conversation and in no sense was the conversation between her and her grandmother a part of the *res gestæ*.

The question as to whether she had been restrained from visiting the house of defendant after the occurrences of May 18 called for an immaterial fact. What had been the action of the grandmother in that regard did not tend to establish any of the ingredients of the alleged crime. The grandmother had no personal knowledge of the matter and her conclusion and action upon the matter as she had heard it told was immaterial; yet her action in restraining the girl may have had some influence with the court in dealing with the evidence and considering whether a conviction of the defendant should be had.

*Also held*, That considering the evidence of complainant and the evidence and declarations of defendant the evidence tended very strongly to establish that all that was done by defendant was with the assent of the girl. There is no pretence that there was any rape, attempt at rape or illicit intercourse. The cases cited by Porter, J. and what was said by the court in 32 N. Y., 534, as well as the

opinion of the court in 18 Hun, 330. indicate that the assent of the child, though of such tender years, may be established as a defense to a charge of indecent assault.

Conviction and judgment reversed and new trial ordered.

Opinion by *Hardin, J.; Smith, P. J., and Barker, J.,* concur.

### WILLS. TENANTS IN COMMON.

N.Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Cornelius Vanderzee et al., *respts.*, v. Harmon Slingerland, *applt.*, et al., *respts.*

Decided Jan., 1884.

By the will of V. all his property was devised to C. "subject to the proviso hereinafter contained." The will then provided for the support of the widow, gave certain legacies which were to be paid by C. within two years, and finally provided that if C. should die without issue the estate should go to testator's grandchildren. C. outlived testator thirty-six years and then died without issue. *Held*, That the estate devised to C. was a conditional fee and that C. having died without issue the estate passed to the grandchildren.

A tenant in common in possession of the premises cannot be held liable for rents and profits and use of the premises before he has been required by his cotenants to yield to and recognize their rights, and has refused to do so.

Appeal by defendant S. from a judgment in an action for partition.

Respondents claim to be owners of the premises in question under the tenth provision of the will of one V. Appellant claims under the will of C. V.

The will of V., after providing for the payment of his debts, devises to his son C. V. all his estate "subject to the proviso hereinafter contained." It then provides an ample support for his widow out of said estate so long as she lives, and gives legacies to different persons. It then provides that C. V., in consideration of the devise to him, shall pay said legacies within two years after testator's death. By the tenth clause it provides, "that if my son C. dies without issue that then the estate herein devised to him shall go to my grandchildren," naming them, "share and share alike, and in case my son C. should die before the provisions of this will become an act the devisees last named shall perform and fulfil all the conditions required of my son C. to the legatees named in this my will."

Testator died in 1840. The will was proved and C. V. entered into and remained in possession until 1876, when he died without issue. He supported his mother during her life and paid off the legacies. He left a will by which he devised the lands in question to defendant S., who was one of the grandchildren named in the will of V.

*N. C. Moak*, for *applt.*

*E. Countryman*, for *respts.*

*Held*, That the estate devised to C. V. was a conditional fee determinable on the contingency that he died without issue, and which having occurred the estate passed to the four grandsons named in the will. It will be observed that in the clause of the will which con-

tains the devise to C. V. testator does not use any language which gives the estate to him absolutely in fee, for life, for one hour or any definite period whatever; but, instead, the devise is made "subject to the proviso hereinafter contained." When that proviso or condition is ascertained by an examination of the rest of the will, the will should be construed as if the condition or proviso formed a part of the language of the clause by which the devise is made. The clause would then read, "I devise all my real estate to C. if he shall die leaving issue, but if he shall die leaving no issue I devise it to my grandsons, naming them. "And in the latter event, and in case C. shall not have paid the legacies provided in the will, then these grandsons are to pay them."

That this construction is not inconsistent with the other parts of the will, nor does it interfere with their meaning or effect. It is manifest from the will that testator devised and intended to compass some other objects besides the devise of the body of the estate. He intended to make provision for the support of his wife during her life, and for this purpose provided she should have her support out of the estate devised, and this support she would be entitled to have whether the estate should go to C. V. and his issue in fee or should terminate at his death for want of issue and then pass to the grandsons in fee. Testator also bequeathed certain legacies and made effectual provision for their payment. C. V. was to

pay them, if he survived testator, within two years from the latter's death. If he did not survive and died without issue the grandsons would pay the legacies. If C. V. died within two years and left issue, the issue would pay the legacies.

It is claimed that testator intended the devise to the grandsons should only take effect in case of the death of C. V. in the lifetime of testator and his so dying without issue.

*Held*, That if that had been the intention of testator it would have been both easy and natural to have used language clearly expressive of that idea. He would naturally have said in his will: "in case C. dies before I do and leaves no issue I devise my estate to my grandsons." He would have been far more likely to have used this plain and simple language than the language found in the will and which expresses, as we think, a very different intention. 70 N. Y., 581.

It is claimed that the estate devised to C. V. became enlarged to the utmost possibilities of the language used by reason of the charge of the payment of the legacies.

*Held*, That that rule was never applicable to cases where there were clear words of limitation to the estate devised, and was never resorted to where the intent of the testator was manifest. 12 Wend., 83; 17 id., 393; 7 N. Y., 163. On the contrary that rule was resorted to professedly and could only be legitimately resorted to to aid in the discovery of the intention of testator. 4 Trans. App., 485.

The result of the trial was that plaintiff and certain of the defendants were adjudged owners of the land as tenants in common, and that the other owners were entitled to recover of defendant S. three-fourths of the rents, profits and value of the use of the premises from 1876, less certain charges for improvements, &c., paid by S. There was no finding that plaintiff ever demanded possession or asserted any right in the premises until he commenced the action, nor of any ouster or refusal by S. to allow plaintiff to enter and possess until he put in his answer.

*Held*, Error. One tenant in common is not liable to his cotenant for mere occupancy, but may be liable where he has received rents from others for the premises or part of them, or where there has been an agreement to pay or where there has been waste committed by the removal and sale of a portion of the common property. 18 Hun, 153; 18 Barb., 265; 44 id., 447; 66 id., 553. I do not see how or why S. should be held liable for rents and profits and use of premises before he had been required by plaintiff to yield to and recognize the rights of plaintiff and the other defendants as cotenants. That S. should be charged with three-fourths of the annual rental from the time of the commencement of the action, less the sum allowed for improvements, &c.

Judgment modified accordingly and affirmed as modified, without costs.

Opinion by *Potter, J.; Learned, P. J.*, and *Boardman, J.*, concur.

## NEGOTIABLE PAPER. CONSIDERATION.

N. Y. COURT OF APPEALS.

Miller, *applt.*, v. Mackenzie et al., *admrs.*, *respts.*

Decided April 22, 1884.

In an action on a promissory note which stated it was given for cash loaned the answer set up want of consideration. *Held*, That either party could show the true consideration.

Where a note is given in part upon an agreement by the payee to render future services the performance of such services furnishes a good consideration for the note although not rendered under a binding contract to perform, which could have been enforced by the maker.

This was an action upon a promissory note for \$5,000 given by M., defendant's intestate, "for cash loaned," as it stated, to plaintiff. The defense set up was a want of consideration.

*Edward P. Wilder*, for *applt.*

*I. T. Williams*, for *respts.*

*Held*, That either party could show the true consideration of the note. 1 Parsons on Notes and Bills, 194; 1 M. & G., 791; 38 N. Y., 263; 67 id., 321.

Upon the trial the court charged, that if as a part and parcel of the consideration of the note at the time it was given M. understood that plaintiff was to render some future services and she so gave him to understand, but the jury are not satisfied that there was an express contract promise on her part to render those services,



which M. could have enforced against plaintiff, and upon which she would have been liable to him for damages in case she had violated it, then she could not recover the \$5,000 on the note, but only the value of the services rendered and which had been proved to the satisfaction of the jury. It appeared that the future services were rendered by plaintiff.

*Held*, That the charge was erroneous; that it was not necessary that the future services in order to furnish a consideration must have been rendered under a contract binding the promisee to render them. Her subsequent rendition of them furnished the consideration to uphold the note and made the consideration in that respect just as good and valid as if she had made a binding promise to render them. 5 Pick., 379; 121 Mass., 529; 9 Barb., 202; 7 N.Y., 349; 45 id., 45; 46 id., 564; 71 id., 254; 83 id., 26; Add. on Contracts, 14; Parsons on Contracts (5th ed.), 448.

The rule laid down in Chitty on Contracts, that if one party to an agreement was never bound on his part to do the act which forms the consideration for the promise of the other the agreement is void for want of mutuality, is confined to cases where the want of mutuality would leave a party without a valid consideration for the promise at the time it is to be performed, and not at the time it was made.

Hulse v. Hulse, 17 C. B., 711, distinguished and overruled.

If the note was given by M. for services rendered to him by plain-

tiff and for services she should render and which she subsequently did render in reliance upon his promise she was entitled to recover the full amount of the note, although it was much greater than the real value of the services. 42 N. Y., 369; 64 id., 596.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed and new trial granted, the judgment having been appealed from because of the insufficiency in amount of the verdict.

Opinion by *Earl, J.* All concur.

### NEGLIGENCE.

N. Y. COURT OF APPEALS.

Murphy, by guardian, *respt.*, v. Orr et al., *appls.*

Decided April 29, 1884.

One who drives horses along the streets of a city is bound to anticipate that foot passengers may be on the crossings and to take reasonable care not to injure them, and he is negligent when he fails to look out for them or when he sees them and does not avoid them so far as is in his power.

This action was brought to recover damages for injuries received by plaintiff, an infant under four years of age, who was run over on the crosswalk of a street in New York City. It appeared that the day was clear and bright, the street unobstructed, the horses quietly moving on a walk, were completely under the control of the driver, who from his high seat could see a block away and all around in front and on both sides.

Plaintiff, while passing over the crosswalk, was knocked down by one of the horses, run over by the forewheel of the wagon and seriously injured. A person who witnessed the accident from the opposite side of the street ran to plaintiff's assistance and shouted to the driver to stop, but he paid no attention to him and drove on until stopped by an officer who had heard the cry and followed him up the street. The driver swore that he neither saw the child nor knew of the accident until he was stopped by the officer.

The court charged that under all the circumstances he was negligent in not discovering the child in time to prevent the injury.

*Winchester Britton*, for appls.

*Clifford A. H. Bartlett*, for resp't.

*Held*, No error; that the conduct of the driver was sufficient to justify a finding by the jury that the driver failed to exercise due care. 45 N. Y., 194.

Whoever drives horses along the streets of a city is bound to anticipate that travelers on foot may be at the crossing, and must take reasonable care not to injure them. He is negligent when he fails to look out for them or when he sees and does not so far as is in his power avoid them.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

## TRESPASS. PRACTICE.

N. Y. COURT OF APPEALS.

Hussner, admrx., *resp't.*, v. The Brooklyn City RR. Co., *appl't.*

Decided April 29, 1884.

A complaint alleged that plaintiff's intestate was the owner of certain premises subject to the easement of a highway in a portion thereof, and that defendant wrongfully entered on the portion used as a highway and committed acts of trespass by running daily therein steam engines and cars, to the injury of said premises and plaintiff's business in the adjacent building. *Held*, That the facts alleged, if proved, would have made a good cause of action for trespass and that it was error to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Affirming S. C., 18 W. Dig., 217.

The complaint in this action alleged that H., plaintiff's intestate, owned a portion of a highway on which defendant trespassed.

The description in the deed under which H. claimed was set forth, and there followed it an allegation that H. was possessed of the premises in question, "subject only to the public easement of a common street or highway in that part thereof called Third avenue, which is used as a public street," and that while H. was thus in possession defendant unlawfully entered "upon a portion" of the same, "which is used as a public highway" and committed acts of trespass and injuries to said premises "by running thereon daily during said period steam engines and cars propelled by steam, to the injury of said premises, in the depreciation of said building and real estate, and to the injury of

the hotel business carried on by said decedent" to the amount of \$5,000. Judgment was demanded for that amount with costs. The defendant's answer set up a general denial. The complaint was dismissed on the ground that it did not state facts sufficient to constitute a cause of action.

*Winchester Britton*, for applt.

*Geo. W. Roderick*, for respt.

*Held.* Error; that plaintiff should have been permitted to prove the facts alleged in the complaint, and to have had her deed read and construed in the light of such pertinent and admissible facts as she was able to establish; that the facts alleged, if proved, would have made a good cause of action for a trespass.

Judgment of General Term, reversing judgment dismissing complaint and granting new trial, affirmed, and judgment absolute for plaintiff on stipulation.

Opinion by *Finch, J.* All concur.

### STAY.

#### N. Y. COURT OF APPEALS.

*Hills, respt., v. The Peekskill Savgs Bk, applt.*

Decided April 22, 1884.

An application to stay proceedings pending an appeal under § 1312 can only be made to the court from which the appeal was taken, except where the appeal is in the same court which rendered the judgment, or where the appeal is taken under Titles 8 or 5 of Chap. 12 of the Code.

This was a motion to stay plaintiff's proceedings pending an appeal to this court. The case was tried at the Wyoming Special

Term, September, 1882, and plaintiff obtained a judgment which required defendant, within thirty days after service upon it of a copy thereof, to deliver to the clerk of said county certain bonds and coupons, to be cancelled, and directing the same should be cancelled. A copy of the judgment was served on defendant, September 29, 1882. The bonds and coupons were not delivered as required by the judgment. A motion was made showing these facts, and on January 28, 1883, the Special Term made an order that a writ of *distringas* should issue unless defendant within sixty days after the service of a copy of the order procured an order of the Supreme Court, upon the usual notice, staying plaintiff's proceedings pending the appeal. Defendant did not apply for such stay, but appealed both from the order and judgment to the General Term, where both were affirmed, and defendant appealed to this Court. The only undertaking given is the usual one to secure costs of the appeal. The appeal was taken under Title 2, of Chapter 12 of the Code, authorizing appeals to this court.

*L. W. & L. L. Thayer*, for applt.

*W. F. Cogswell*, for respt.

*Held.* The motion should be denied. An application for an order in such a case, under section 1312, can only be made to the court from which the appeal is taken. The only cases where, under section 1312, the application can be made to the court to which the appeal is taken (except where the

appeal is in the same court which rendered the judgment or made the order appealed from under the fourth title), are those where the appeal is to the Supreme Court from an inferior court, under the third title, or to the General Term of the Supreme Court or of a superior city court in a special proceeding under the fifth title.

Motion denied.

Opinion by *Andrews, J.* All concur.

## CORPORATIONS. STOCK-HOLDERS.

### N. Y. COURT OF APPEALS.

*Robinson, respt., v. The National Bank of New Berne, applt.*

Decided April 29, 1884.

By the assignment and transfer of the certificates of stock a purchaser obtains the entire, legal and equitable title thereto and it is the duty of the corporation on receiving notice to make the transfer on its books, and a refusal to do so is a wrong.

The requirement of a register of transfers is waived when the corporation wrongfully refuses to make it.

After such a refusal a subsequent transferee is not required to demand a transfer to him on the books to entitle him to maintain his rights as a stockholder.

This action was commenced October 9, 1880, to recover the dividends declared by defendant on sixty-one shares of its capital stock, of which plaintiff claimed to be the lawful owner and holder. It appeared that fifty of said shares were owned by one S. in January, 1867, and the remaining eleven in May, 1869, and stood in his name upon defendant's stock ledger, and he held the certificates

therefor. Prior to July, 1869, S., for a good and valuable consideration, by an instrument in writing, sold and assigned the shares to one H., and transferred to him the certificates, and H. thereupon sent the certificates and assignment to him to defendant, and demanded a transfer of the stock on defendant's books. Defendant refused to make the transfer and returned the assignment and certificate to H. After this defendant sued S., and upon an attachment seized and sold H.'s stock, the Bank of R. becoming the purchaser. H. transferred the stock to plaintiff by delivery and assignment of the certificate to plaintiff. While H. owned the stock dividends amounting to \$3,599 were declared, and after plaintiff became the owner further dividends amounting to \$915 have accrued. The referee rendered judgment for plaintiff for the dividends accruing after the transfer to him.

*A. R. Dyett*, for applt.

*T. C. Cronin*, for respt.

*Held*, That by the assignment and transfer of the certificates to him, H., as against S. and defendant, had obtained the entire legal and equitable title to the stock, 46 N. Y., 331, and it became defendant's duty on receiving notice to make the transfer as requested on its books, and its refusal to do so was a wrong from which no right could spring. The requirement of a registry, existing only for defendant's own protection and convenience, must be deemed waived and nonessential when it wrongfully refuses to obey its own

rule. 49 N. Y., 220; 94 id., 415; 17 Alb. L. J., 146.

*Also held*, That it was not necessary for plaintiff to demand a transfer of the stock to him on defendant's books, defendant's acts already being equivalent to a refusal to pay any one except its chosen transferee. 90 N. Y., 229.

*Southwick v. First National Bank*, 84 N. Y., 432, distinguished.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

### NEGLIGENCE.

#### N. Y. COURT OF APPEALS.

*Lewis, applt., v. The State, respt.*

Decided May 6, 1884.

The doctrine of *respondet superior* is not applicable to the State, except when the Legislature has voluntarily assumed it.

Claimant was sentenced to the reformatory and while there was injured by reason of defects in implements which he was required to use in his work. *Held*, That he could not recover against the State for such injuries; that the State was not his master in any ordinary sense, and that if while in confinement he sustained injury it must be attributed to the cause which placed him there.

The appellant, in March, 1879, was convicted of burglary and sentenced to the State Prison or Industrial Reformatory at Elmira, described in Chap. 427, Laws of 1870, as the State Reformatory. Said statute declares that its discipline shall be reformatory and empowers its managers to use such means of reformation consistent

with the improvement of its inmates as they may deem expedient, and declares that agricultural labor or mechanical industry may be resorted to by them as an instrument of reformation, but excludes the contract system of labor in all its forms and provides that the prisoners shall be employed by the State. The appellant was set at work in the hollow ware department, and while engaged in carrying molten iron in a ladle discovered a crack in the shank which connected the bowl with the handle. He called the overseer's attention to the crack, but no attention was paid to his complaint, and the next time he used the ladle the bowl separated from the shank and the molten iron coming in contact with the water on the floor exploded and seriously injured him. In January, 1882, he was discharged.

In October, 1882, he presented to the Board of Audit a claim against the State for damages, which was transferred to the Board of Claims, where it was dismissed.

*E. Countryman*, for applt.

*D. O'Brien*, Attorney-General, for respt.

*Held*, No error; that the appellant was not entitled to recover, the doctrine of *respondet superior* not being applicable to the State, except when its Legislature has voluntarily assumed it. Story on Agency, 7th ed., § 319.

The claimant was not a voluntary servant for hire and reward, nor was the State his master in any ordinary sense. Being compelled to labor as a means of reformation and to endure imprison-

ment as a punishment and for the protection of the community, and while employed being subject to such regulations as his keeper might from time to time prescribe, if in the course of service he sustained injury, it must be attributed to the cause which placed him in confinement.

Judgment of Board of Claims, dismissing claim, affirmed.

Opinion by *Danforth, J.* All concur.

## BANKRUPTCY. STOCK EXCHANGE.

### N. Y. COURT OF APPEALS.

Platt, assignee, *applt.*, v. Jones, *respt.*

Decided April 29, 1884.

A seat in the Stock Exchange is property and may, under the conditions prescribed in its constitution and by-laws, be transferred. Such seat, as between a bankrupt and his assignee, will fully pass under the assignment and be vested in the assignee.

Where it does not appear that the bankrupt has interfered with or denied the assignee's rights in the property, the courts will not, until the assignee has given notice of such transfer to the Exchange, restrain the bankrupt from acting as one of its members.

This action was brought by plaintiff as assignee in bankruptcy to enjoin and restrain the defendant J. from using and occupying a seat or membership in the N. Y. Stock Exchange, and to compel him to execute and deliver a proper instrument of assignment and transfer of the same, and all his right, title and interest therein, to the plaintiff, or such other person or persons as the court might designate. It appeared that in 1878,

the firm of D. & J., of which defendant is a member, were put into bankruptcy by its creditors. At that time it owned a seat in the New York Stock Exchange, the title to which stood in the name of J. This seat was included in the schedule of its property made in the bankruptcy proceedings, and was estimated to be worth \$6,000. Plaintiff was appointed assignee. In 1879 the bankrupts were discharged. J., notwithstanding the assignment to plaintiff, continued to use and enjoy all the privileges of the Stock Exchange. It appeared by the constitution and by-laws of the Stock Exchange, which were put in evidence, that persons can become members and obtain what are called seats therein only upon election in accordance with such constitution and by-laws; that an initiation fee of \$20,000 for new members is required; that membership in the Exchange may be transferred subject to the conditions in the constitution and by-laws, and in the mode therein prescribed, and a member thus admitted by transfer is required to pay an initiation fee of \$1,000. Such transfer can only be made with the consent and approval of the Exchange in the manner specified in the constitution and by-laws. It was found that a seat or membership in the Exchange was then worth \$30,000. The members were required to pay dues, which were a prior lien upon the seat and its proceeds, and such proceeds were also made liable for satisfying the claims of other members of the Exchange before the bal-

ance can be paid to the legal representatives of the member.

*Nathaniel F. Prentiss* and *Richard M. Bruno*, for applt.

*Will. Mann*, for respt.

*Held*, That a seat or membership in the Stock Exchange is, in a certain sense, property, and may, under the conditions prescribed in the constitution and by-laws, be transferred and transmitted and converted into money. 60 How. Pr., 426; 4 Abb. N. C., 67; 89 N. Y., 328; 28 Alb. L. J., 512, 176; 19 N. B. R., 224; 94 U. S., 523.

The property in the seat in question, as between J. and plaintiff, passed by the assignment in bankruptcy, and as between them vested in plaintiff as fully as it had in defendant.

It did not appear that plaintiff had applied to the Exchange to have his rights recognized, or that the Exchange had in any way denied his rights, or had attempted to put any one in defendant's place. Nor did it appear that defendant had in any way interfered or threatened to interfere with, or denied plaintiff's rights of property, or in any way impaired his rights, or done anything to injure plaintiff.

*Held*, That plaintiff's rights were not injured or impaired, although the Exchange, notwithstanding the assignment, chose to recognise defendant as a member; that upon the facts appearing and until notice by plaintiff to the Exchange, it was unnecessary to restrain defendant from acting as one of its members.

After the discharge of a bank-

rupt, and while it is in force, the bankrupt court has no more jurisdiction over him, and he can only be compelled to act in some regular proceeding as a party thereto or as a witness therein.

A State court would have jurisdiction of an action like the present, when sufficient facts exist. 10 Met., 583; 101 Mass., 109; 55 N. Y., 150.

Judgment of General Term, reversing judgment in favor of plaintiff, affirmed, and judgment absolute against plaintiff on stipulation.

Opinion by *Earl, J.* All concur.

## LOAN COMPANIES.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. The Mutual Trust Co., *applt.*

Decided April 29, 1884.

The Mutual Trust Co. was a corporation authorized to receive deposits, a guaranty company and a loan and mortgage company within the meaning of Chap. 324, Laws of 1874, and therefore one of the corporations required by the act to report to the Bank Department.

This action was brought to dissolve the defendant, on the grounds that being a corporation it had become insolvent and remained so for at least one year; that it was unable to pay its debts in full, and that having been required to make a report to the Superintendent of the Bank Department, as provided by the statute (Laws of 1874, Chap. 324), it had neglected and refused to do so. It appeared

that defendant was organized by Chapter 279 of the Laws of 1868 by the name of the Public Exchange, which has since been legally changed to its present name, "with power to establish and conduct in the city of New York an exchange for the daily meeting of bankers and tradesmen, and for other purposes." It was empowered (§ 8) "to establish a public exchange mart for receiving deposits of and transferring earnest moneys, stocks, bonds and other securities and valuable property, and for the convenient delivery and interchange of the same between the dealers therein, and for the procurement and making of loans on the same; for the intermediary adjustment of balances of accounts between its members and dealers for the purchase and sale of securities and coin, guaranteeing the payment of bonds and other obligations, and for the transaction and adjustment of such other business incident thereto as may be provided for in the by-laws of said corporation." Section 9 provides that it shall be lawful for the corporation to purchase, lease, hold and convey real estate as follows: "1. Such as shall be necessary for the convenient transaction of its business and that of its members and dealers. 2. Such as shall be mortgaged to it in good faith by way of security for loans made by or moneys due to said corporation. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or, 4. Such as it shall

purchase at sales upon judgments, decrees or mortgages held or guaranteed by said corporation." Section 10 provides that it may loan to its members and dealers such of its funds as its trustees may deem prudent; borrow money and reloan the same, and give and receive suitable obligations for the same; that it shall not receive more than the legal rate of interest or higher rate of commissions than is allowed by law; that it may invest its funds in notes, bonds, bills of exchange or other securities made or issued in other States of the Union at the rates of interest allowed in such States; that if it subserves the convenience of its members its different branches of business may upon a vote of all the trustees at a regular meeting be conducted in separate buildings. Defendant refused to make the report required by the Act of 1874 on the ground that it was not one of the corporations required by that act to report.

*Samuel Hand*, for applt.

*D. O'Brien*, Atty.-Gen'l, for respts.

*Held*, Untenable; that defendant was a corporation authorized to receive deposits, and a guarantee company, a loan and mortgage security company within the meaning of the Act of 1874.

Order of General Term, denying motion for new trial and affirming order dissolving defendant, affirmed.

Opinion by *Earl, J.* All concur.



JOINT DEBTORS. SEVER-  
ANCE.N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.Milton Smith et al., admrs.,  
*respts.*, v. Cornelia A. Kibbie,  
*applt.*

Decided Jan., 1884.

The death of one of the makers of a joint and several note against whom a separate judgment was rendered prior to the Code of Civil Procedure will not discharge his liability. Entry of the judgment severed the joint liability and barred an action against the other maker.

Appeal from judgment entered on the report of a referee.

Action to declare the estate of O., plaintiffs' intestate, absolved from liability upon a note and judgment entered thereon.

In October, 1874, the note aforesaid was made jointly by O. and Mrs. B., O. being an accommodation maker. The note was sold by Mrs. B. to one W., who had knowledge that O. was an accommodation maker. In April, 1876, W. recovered judgment on the note against O. alone. O. died intestate in April, 1877. Thereafter W. assigned the judgment to defendant, who claims it to be valid and a lien on the estate of O.

The referee held as matter of law that plaintiffs were entitled to have the judgment held by defendant against their intestate "discharged and the lien and obligation of said judgment cancelled."

*H. C. Kingsbury*, for applt.

*A. A. Van Dusen*, for respts.

*Held*, Error; that when the judgment was recovered against O. alone the creditor elected to treat him as the several debtor. O. made no defense and the judgment entered against him upon his joint note was valid as to him, though it may have been irregular and might have been set aside for irregularity if a motion had been promptly made. 19 Hun, 569; 24 id., 443.

That the entry of the judgment severed the joint liability of the makers of the note and the judgment debtor thus became liable alone on the judgment. 18 Johns., 481. As to the creditor the severance was perfect and by his consent, and the debtor acquiesced in the same for nearly a year. 18 N. Y., 468. That the judgment would have been a bar to an action against the other joint maker of the note. 18 N. Y., 468; 1 Den., 224; 4 Seld., 413; 18 W. Dig., 1.

That as the judgment was prior to the Code of Civil Procedure neither § 758 nor § 1278 apply.

Defendant by her purchase of the judgment from W. became the owner of a valid claim or debt against O., to which he had for nearly a year in his lifetime omitted to make any defense or to in any manner question.

To hold that O.'s death after a separate judgment against him discharged his liability would be to advance one step beyond any case to which our attention has been directed. 87 N. Y., 346. See also 84 id., 366.

*Risley v. Brown*, 67 N. Y., 160; *Hauck v. Craighead*, id., 433, and

U. S. v. Price, 9 How., U. S., 83, distinguished.

Judgment reversed, and new trial ordered before another referee, costs to abide event.

Opinion by *Hardin, P. J.*; *Barker* and *Dwight, JJ.*, concur.

## TRUSTS. ESTOPPEL.

### N. Y. COURT OF APPEALS.

The People v. The City Bank of Rochester. *In re* application of Sartwell et al., *respts.*, to compel Atkinson, recr, to pay certain notes.

Decided April 29, 1884.

Respondents, for the purpose of anticipating payment of their notes which had been discounted by the bank, gave their checks for the amounts of said notes, which checks were charged to respondents and their notes marked paid on the books. In fact the notes had been sold by the bank to other parties, of which fact respondents were ignorant, and the bank failed before maturity of the notes. *Held*, That a trust was created, the violation of which constituted a fraud by which the bank could not profit; that there was a specific appropriation of a particular fund for the payment of the notes; that the bank was estopped from claiming that the transaction was a mere matter of bookkeeping, and that respondents were entitled to an order requiring the receiver to pay said notes.

An application for such purpose is a special proceeding, and costs may be awarded in the discretion of the court.

The firm of S., H. & F. was engaged in business at R., and was a depositor with the R. City Bank, which from time to time discounted its notes payable in the City of New York, but with the understanding that they should in fact be paid at the bank. In November, 1882, two of such notes, one for

\$3,000 and one for \$5,000, were outstanding and to become due respectively January 6th and 20th, 1883. S., H. & F., wishing to anticipate payment, on November 3d so informed the bank in regard to the \$3,000 note, and gave and the bank received its check for the amount of the note, less rebate of interest, payable "to our note due January 6, 1883, or bearer." The bank charged the check to the account of the firm and marked it "paid November 3d, 1882," at the same time making an entry in its books that the note was paid "November 3, 1882." On November 9th substantially the same transaction was had between the firm and the bank in reference to the note due January 20, 1883, and the full sum of the two checks given by the firm was deducted from the amount of its deposits with the bank. The bank had, in October, 1882, sold both notes and received from the purchaser the avails. The firm was ignorant of this and supposed that at the time in question the bank held and owned the notes. In December, 1882, the bank was declared insolvent and A. was appointed receiver of its property and effects. The bank failed to pay the notes and the receiver refused to do so without an order of the court. The receiver stated that the cash found by him in the vaults of the bank amounted to less than \$8,000. The firm applied for an order directing a payment of the notes. Before the application was made, A. had received about \$75,000 belonging to the bank.

*M. H. Briggs*, for applt.

*Theodore Bacon*, for resp't.

*Held*, That by the transaction in question a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. There was a specific appropriation of a particular fund for the payment of the notes. 104 U. S., 303; 14 Hun, 8; 75 N. Y., 598.

*People v. M. & M. Bk.*, 78 N. Y., 269, distinguished.

As soon as the checks of the firm were collected the bank was bound to hold the proceeds for and apply them on the payment of the notes, or failing to do this to return them to the firm. As to it the bank was bailee or trustee, but never owner. It is estopped from saying that all this is a matter of bookkeeping. Whether the notes were to be paid presently, or in the future, is immaterial.

The checks given by the firm were impressed with the trust, and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion. 52 N. Y., 1; 84 id., 121.

*Also held*, That the application of the petitioners was not a motion under § 768 of the Code, but a special proceeding for the enforcement or protection of a right under § 3334 of the Code, and costs might be awarded in the discretion of the Courts as on appeal from a judgment taken to it. Code, § 3240.

Order of General Term, reversing order of Special Term denying motion, affirmed.

Opinion by *Danforth, J.* All concur.

### EXCISE.

#### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Henry Rodgers, Overseer of the Poor, *applt.*, v. Charles P. Coyle et al., and nineteen other cases, against different defendants.

Decided Jan., 1884.

An Overseer of the Poor has the right to make a motion to discontinue a proceeding brought by others in his name to recover penalties for violation of the excise law.

Where complaint is made to the overseer of violations of the excise law accompanied by the proofs thereof and he refuses to bring the necessary actions or examine the proofs he thereby waives the production of further proofs, and is estopped from questioning the sufficiency of the complaint or proofs, and his motion to discontinue a suit brought by the complainants in his name should be denied.

Appeal from order denying motion by plaintiff to dismiss and discontinue the above-entitled actions.

Actions to recover penalties for violations of the excise law.

These actions were brought by S. and others, citizens of Canandaigua, in the name of plaintiff, as Overseer of the Poor of that town, after refusal by him to prosecute.

The opposing affidavits show that a complaint was made by S. and others to plaintiff of violations of the excise law and S. was informed of all the names of persons

who were to be prosecuted and a bundle of papers was presented to him which he was told was the testimony in full by which said violations would be proved, with the names of the witnesses; that the matter was all talked over and fully understood; that Rodgers stated that he was satisfied that S. had the evidence necessary and did not care to see the same or look them over; that he refused to commence said actions and declared he would not in any way interfere with, oppose or hinder any action S. and others might take, and signed a paper refusing to commence any prosecutions and authorized the names of the parties proposed to be sued to be inserted therein, and that the actions were brought in reliance on the waiver of proofs and the satisfaction with the proofs offered expressed by plaintiff.

The moving affidavit was in conflict with some of these facts.

*W. H. Adams*, for applt.

*C. A. Hammond*, for respts.

*Held*, No error. There can be no question under the authorities as to the right of Rodgers, as Overseer of the Poor of the town, to make such a motion. 36 Barb., 266; 4 Den., 270; 62 How., 313; 5 Hun, 534. But upon a full consideration of all the affidavits used on the motion we have come to the conclusion that the County Court was fully warranted in believing the facts found in the opposing affidavits and we ought not on this appeal to overturn its conclusion in respect to the fact.

That the overseer received a suf-

ficient complaint to answer the requirement of the statute and that he waived the production of any further proof of the violations complained of, 82 N. Y., 620, and that as he declined to prosecute for reasons other than the want of evidence it is not material to inquire whether the proofs submitted to him were as full and explicit as he might have required.

*Jobbitt v. Giles*, 22 Hun, 274, and *Hess v. Appel*, 62 How., 313, distinguished.

That the County Court was warranted on the proofs in holding that the overseer is estopped from questioning the sufficiency of the complaint or the sufficiency of the proofs produced to him and that the court was justified under the authorities in denying the motion.

Order affirmed, with \$10 costs in one action and disbursements in all.

Opinion by *Hardin, J.*; *Barcker, J.*, concurs; *Smith, P. J.*, not voting.

## EVIDENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Ralph T. Wood, respt.*, v. *Jane Holmes, exrx.*, applt.

Decided Jan., 1884.

In an action upon a promissory note against the personal representative of the maker the testimony of plaintiff as to why he borrowed money of deceased instead of asking for it as a payment on the note relates to a personal transaction within § 829 and is not rendered admissible by the introduction in evidence of the testimony of deceased in

another action which does not refer to said loan.

Where there was an oral consent to a substitution of attorneys but no order was entered until after notice of hearing was served on the substituted attorney, *Held*, That such notice was irregular, and that a default taken on a hearing upon said notice should not be allowed to stand.

Appeal from judgment in favor of plaintiff, entered on the report of a referee, from an order opening a default and from an order vacating a stay.

Action on a promissory note made by Farley Holmes, defendant's testator.

On the the trial the evidence of deceased given upon the trial of another action was read by consent. It was shown by a letter from plaintiff to deceased that on Feb. 21, 1877, he asked to borrow a check for \$250 from deceased. The aforesaid testimony of deceased had no reference to said loan.

Plaintiff was then called as a witness, and was allowed, under objection, to testify why he asked to borrow the \$250 instead of asking that it be paid on the note.

*Wm. M. Johnson and T. Bacon*, for applt.

*Wood, Butler & Morris*, for resp't.

*Held*, Error; that the inquiry involved a personal transaction with Holmes, who died before the trial, and was objectionable under § 829 of the Code. The exception in the latter part of § 829 does not apply. Under that exception doubtless plaintiff could testify "concerning the same transaction or communication" spoken of by

Holmes. But Holmes said nothing about the loan by him to Wood of \$250 in the evidence which the executrix caused to be read from the evidence in the other case.

An arrangement had been made for the substitution of M. as attorney for defendant in the place of S. & S., but the written consent of the former attorneys was not filed nor the order of substitution entered until Aug 15, 1879. Prior to that time notice of hearing was served upon M. and upon the hearing, no appearance for defendant being made, a default was taken. The court thereafter granted an order opening the default and allowing defendant to come in and be heard.

*Held*, No error. When the default was taken the action had not been regularly noticed for hearing. S. & S. remained the attorneys of record until Aug. 13, 1879, and a service of notice of hearing upon M. was irregular. Code Civ. Pro., § 779; Rule No. 10. No order having been entered until the filing of a written consent to change attorneys the oral arrangement was not effectual. 13 How., 250; 69 Barb., 446; 49 How., 138.

*Bradley v. Merrick*, 25 Hun, 272, 91 N. Y., 293, distinguished.

An irregular trial or hearing had without notice to a party or his attorney ought not to have the effect usually given to a trial or hearing where a party has notice of the proceedings or trial had and voluntarily absents himself from the proceedings or trial.

*Also held*, That the stay order,

which was vacated, rested in the discretion of the County Court.

Judgment reversed and new trial ordered, costs to abide event, and orders affirmed, without costs and without prejudice to a new application for a stay.

Opinion by *Hardin, J.; Smith, P. J., and Barker, J.*, concur.

### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Charles G. Judd et al., *respts.*,  
v. George W. Buskin, *applt.*

Decided Jan., 1884.

In an action by attorneys to recover for services the defense was that defendant was not to pay except in case of success and proof of a conversation to that effect with one of the plaintiffs was given. Plaintiffs offered to prove that the other plaintiff was a partner and that no such conversation took place, which offer was rejected. *Held*, Error.

Appeal from order granting new trial after verdict for defendant.

Action by plaintiffs as attorneys to recover for services and disbursements in an action in which this defendant was plaintiff and one H. defendant. Defense, that plaintiffs agreed to perform these services without any charge to this defendant in the event that he was unsuccessful, which proved to be the case.

Evidence tending to show that such agreement was made was given, the proof mostly coming from a conversation alleged to have been held by defendant with plaintiff Judd. This conversation

was denied by Judd. Plaintiffs then offered to show by plaintiff Davis that he was a partner with Judd, and *that no such conversation ever took place*. This offer was refused, the court holding that that would prove nothing.

*Wood, Butler & Morris*, for applt.

*A. C. Harwick*, for respts.

*Held*, That for such ruling we see no justification. Because it already appeared that Davis and Judd were partners furnishes no reason for shutting out that fact; much less for excluding evidence that "no such conversation ever took place" as that which defendant and his witness had just sworn to in support of the alleged agreement on the part of plaintiffs. To show that no such conversation ever took place was to overthrow defendant's defense. To exclude evidence that "no such conversation" took place was not permissible, but was palpable error. Because of that error the County Court very properly set aside the verdict and ordered a new trial.

Order affirmed.

Opinion by *Hardin, J.; Smith, P. J., and Barker, J.*, concur.

### JUSTICES' JUDGMENT. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Henry C. Ripley et al., overseers, *appls.*, v. John McCann, *respt.*

Decided April, 1884.

Where a justice, in plaintiff's absence, received the verdict of a jury, which was in defendant's favor, and thereupon entered judgment of discontinuance, with costs, *Held*. That the judgment was substantially such as the statute required, and the verdict was a nullity and no bar to a second suit for the same cause.

Appeal from judgment of County Court, affirming justice's judgment.

The case was tried by the justice with a jury. The jury announced that they had agreed on a verdict, and plaintiffs, on being called, did not appear. The justice, however, received the verdict, which was in defendant's favor, but instead of entering judgment upon it, he entered judgment of discontinuance, with costs. The trial took place in December, 1879.

*J. W. Dunwell*, for appls.

*E. K. Burnham*, for respt.

*Held*, That the reception of the verdict was error, 2 R. S., 244, § 110, and if it had been followed up by entering judgment thereon the error would have been fatal. The judgment that was entered was substantially such as the statute authorized and required, 2 R. S., 246, § 119; *id.*, 247, § 124, and it was not vitiated by the error in receiving the verdict, as that error worked no harm to plaintiffs.

The verdict was a nullity, and was so treated by the justice in entering judgment, and consequently it could not operate to bar another action.

*Felton v. Mulliner*, 2 Johns., 181, distinguished.

Judgment of County Court and that of the justice affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Richard Burgett, *applt.*, v. Catharine L. Strickland, *admrx.*, *respt.*

Decided April, 1884.

Section 414, Code Civ. Proc., relates to all the provisions of the Chapter of which it is a part. Section 399 falls within the provisions of the Chapter constituting the rules of limitation. Subd. 3 of § 414 has reference to the mode of commencing an action prescribed by the Chapter of which it is a part, and compliance with § 99 of the old Code is not enough.

Appeal from judgment dismissing complaint, entered upon a decision at Circuit in a trial without a jury.

The original defendant was Francis Strickland, and he having died his administratrix was substituted in his place. Action on contract. The cause of action accrued January 1, 1873. On December 30, 1878, the summons was delivered by plaintiff's attorney to the sheriff for service on the intestate, and it was served on him personally, September 27, 1879. It was held at Circuit that the demand was barred by the statute of limitations.

*Henderson & Wentworth*, for applt.

*Allen & Thrasher*, for respt.

*Held*, The general rule is that the statute of limitations which was in force when the suit was brought is that which determines

the right of a party to sue. 6 How., U. S., 550. We think § 399 of the new Code controls the present case, and § 414 does not except it from the provisions of § 399. Section 414 relates to all the provisions of Chapter IV., and applies to them all, whether they are strictly rules of limitation or not. Section 399 falls within the provisions of the Chapter constituting the rules of limitation. We think subdivision 3 of § 414 has reference to the mode of commencing an action prescribed by the Chapter of which it is part, and a compliance with § 99 of the old Code, is not enough. The suit was not commenced within the meaning of subdivision 3, and consequently the old Code does not apply, and plaintiff's claim is barred.

Judgment affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### CONSOLIDATION OF ACTIONS. INJUNCTION.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Homer H. Woodward et al.,  
*appls.*, v. Edward A. Frost et al.,  
The Mutual Life Ins. Co., *respt.*

Decided Jan., 1884.

Whether a consolidation of actions shall be ordered rests in the discretion of the court to which the application therefor is made. Where the second action involves inquiry into numerous issues not embraced in the first action a denial of an application to consolidate the actions is proper.

In such a case an injunction to restrain prosecution of the first action will not be granted, as the plaintiffs in the second ac-

tion may upon application be made parties to the first action and so protect their interests.

Appeal from order denying motion to consolidate an action brought by The Mutual Ins. Co. against defendants Frost et al. with this action or for an injunction restraining prosecution of that action until the final determination of this.

In Oct., 1880, Edward A. Frost became wholly insolvent and it is claimed that he is indebted to a large number of persons.

In January, 1883, the Ins. Co. commenced an action in this court to collect a judgment recovered by it in Oct., 1880, against Frost, after having exhausted its remedies at law, presenting a case for application of the provisions of the Rev. Stats. creating a resulting trust in favor of creditors where consideration is furnished by a debtor and property is conveyed to a third party. 1 R. S., 728, § 55.

This action was commenced Feb. 12, 1883, in behalf of plaintiffs, judgment creditors of Frost who had exhausted their remedies at law, and on behalf of all his creditors who were such at the time of the alleged conveyances, and the Ins. Co. was made a party defendant. The complaint in this action embraced lands not referred to in the complaint in the first action and also asked that certain conveyances from Edward to Sarah Frost be adjudged void because made to hinder, delay and defraud creditors.

The affidavit of the Ins. Co. al



leges that the whole amount of the judgment is due and unpaid and that its action is being prosecuted in good faith and for its benefit.

The motion was denied.

*H. H. Woodward*, for applts.

*Edward Harris*, for resp't.

*Held*, No error; that by the very terms of § 817, Code Civ. Pro., whether a consolidation shall be ordered rests in the discretion of the court to which the application is made and that such discretion was properly exercised in this case. No sufficient reason was shown in the moving papers requiring the court to order a consolidation of the two actions. Besides it appears that other grounds of equitable relief in addition to enforcing the trust created by §§ 51 and 52 of the Rev. Stats. in the cases embraced in the first action are put forward by plaintiff in this second action. No doubt is entertained that these several causes of action are properly united in the complaint in this action. Code Civ. Pro., § 1871; 33 Barb., 30; 5 Paige, 65. But the fact that the second action involves inquiry into numerous issues not involved in the first action furnishes a cogent reason for refusing to consolidate the two actions. It cannot be said that the issue in the first action is identical with all the issues made in the second action, and it has frequently been held, upon application to consolidate, that it was important to inquire whether the questions in both actions are identical. 4 Hill, 46.

*Also held*, That no sufficient reason was furnished for granting an injunction. If plaintiffs in the second action are apprehensive that any interest of theirs in the subject matter of the first action, or the title to real estate therein described, "may in any manner be affected by the judgment" in the first action they can upon a proper case make application to the court to be made parties in that action, and upon such proper case appearing to the court "it must direct them to be brought in by the proper amendment." Code Civ. Pro., § 452; 19 Hun, 300; *id.*, 396; 20 *id.*, 75; 25 *id.*, 197; *id.*, 445.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

#### FRAUDULENT CONVEY- ANCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

James Coddington, assignee,  
*resp't.*, v. Abram Vandeventer et  
al., *applts.*

Decided Jan., 1884.

The circumstances that property is conveyed for a consideration named in the deed of less than half the value of the property and that the grantor is to be allowed to reside on the premises and be supported there are sufficient to uphold a finding that such conveyance was made with intent to defraud creditors.

In an action to set aside such conveyance as fraudulent, declarations of the grantor, made subsequent to the conveyance but while he was in apparent possession of the premises, are competent against him.

Appeal from judgment setting aside in part a conveyance of real estate and a transfer of personal property by Abram Vandeventer to his wife.

This action was brought by plaintiff, a judgment creditor of Abram, after execution returned unsatisfied. Plaintiff's debt was contracted before the transfers.

It was found that the real estate was worth \$3,700; that it was conveyed by Abram to his daughter and by her to her mother on the same day and that the consideration recited in each deed was \$1,500. It was found as a fact that the daughter was to receive \$1,500 and her support; that it was at the same time agreed that Abram should at once transfer all his personal property directly to his wife and should work for her at his trade and should continue to occupy said premises and be supported there as he had been. It was also found that the object of the parties was "to prevent the squandering of the property and the forcible application of it to the payment of his debts"; that the necessary result was to hinder and delay the creditors of Abram in the collection of their debts, and that such was the intention of defendants, and as conclusion of law that the transfers were fraudulent as against plaintiff.

*John M. Davy*, for appls.

*D. C. Hyde*, for resp't.

*Held*, No error, that there was sufficient evidence to support the findings of fact. The circumstance that property worth \$3,700 was conveyed for a consideration

named in the deeds of \$1,500 was entitled to great weight in determining the questions made as to the intent of the parties. The inadequacy of the consideration was a circumstance from which fraud might be inferred and found. 2 Johns. Ch., 43. That the circumstance that defendants inserted in the deeds a consideration price of \$1,500 militates against any attempt to assert that there were other or different considerations between the parties. *Id.* 2. The debtor was to be allowed to and did continue to reside upon the premises as and "be supported there as he had been." We must approve the findings of fact, which are to the effect that defendants were engaged in a scheme to hinder and delay creditors.

We must assume, if need be, that the trial judge found all the facts necessary to support the legal conclusions stated, inasmuch as the evidence in the case was such that he might have found them. 86 N. Y., 595.

*Also held*, That defendants cannot be heard to allege error in that the judgment is more favorable to them than it should be and as plaintiff does not complain of the court's direction that the deed might stand as security for the sum actually paid by the grantee this court need not interfere.

On the trial declarations of Abram, made subsequent to the conveyance, were admitted under objection.

*He'd*, No error; that they were competent evidence against him. 1. He was apparently in posses-

sion of the property when they were made and they could not, for that reason, be excluded by the rule that shuts out declarations of a party after a conveyance and surrender of possession, referred to in 56 N. Y., 277, and 40 id., 221. 2. He was a party to this action and his admissions out of court, or when upon the stand as a witness in proceedings supplementary to execution, were competent.

*Wells v. O'Connor*, 27 Hun, 428, distinguished.

Judgment affirmed, with costs.

Opinion by *Hardin, J.; Smith, P. J.*, and *Barker, J.*, concur.

## EXECUTORS. SURROGATES.

### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* accountings of the executors of William Tilden, deceased.

Decided March 7, 1884.

The surrogate possessed the inherent power to appoint a guardian *ad litem* to protect the interests of infants on an accounting of executors before the enactment of Chap. 156, Laws of 1874, specially conferring such power upon him; and, if no such guardian for an infant interested in the estate was appointed on such an accounting had previous to the passage of said act, the decree made thereon is irregular as to such infant, and he can disaffirm the same and apply for its reconsideration after attaining the age of 21 years.

On the application of a person interested in an estate to open decrees made upon various accountings of the executors had during the minority of the applicant, such decrees will be opened and a rehearing of such accountings ordered so far as they affect the petitioner if it appears that no proper investigation of the executor's ac-

counts was made by the special guardians appointed to protect his interests on such accountings, and that charges of questionable propriety were made against his share of the estate by the executors and allowed by the decrees.

It is no answer to such an application that the sums for which the said charges were made were paid to the applicant's testamentary guardian and receipts therefor taken from such guardian.

Appeal from order of the surrogate of New York county denying application to open decrees made upon accountings of the executors of the estate of William Tilden, deceased, and for a rehearing of such accountings so far as they affected the rights of the petitioner.

Petitioner was a son of William Tilden, deceased, and was a beneficiary under his will. The testator died when petitioner was about 11 years old, and, during the petitioner's minority, four accountings were had by the executors. Shortly after reaching his majority petitioner instituted these proceedings. It appeared that no special guardian of petitioner was appointed on the first accounting, and that fact was urged as a reason for setting aside the decree made thereon. It was claimed on the part of the executors that, as this accounting was had before the enactment of Chap. 156, Laws of 1874, which specially conferred upon Surrogates the authority to appoint special guardians on such accountings, the surrogate had no power to make such appointment at the time of that accounting.

*W. S. Macfarlane*, for petitioner, appt.

*C. E. Tracy*, for executors, respts.

*Held*, That, previous to the enactment of the statute, *supra*, the surrogate possessed the inherent authority, arising out of the necessities of the situation and the objects to be attained by means of an accounting, to appoint a guardian *ad litem* to protect the interests of infants, 4 Paige, 102, and, consequently, the omission to make such an appointment was not justified by the absence of statutory authority; and the decree, so far as it affected the interests of the petitioner was irregular, and he was permitted to disaffirm its authority and apply for its reconsideration after he attained the age of 21 years. Dayton on Surrogates, 3d ed., 506-7.

It appeared that the special guardians appointed for petitioner on the other accountings of the executors had failed to make any proper examination of the executors' accounts, and that charges had been made against petitioner's share of the estate and allowed by the decrees made upon such accountings for sums paid out for his maintenance and education during his minority which were of very questionable propriety. The executors resisted the application to open such decrees for the reason, among others, that the sums for which such charges were made had been paid over to petitioner's testamentary guardian, and receipts therefor taken from such guardian, and claimed that petitioner's remedy was to call such guardian to account as

to the expenditure of such money.

*Held*, That the decrees should be opened; that whether the payments to petitioner's guardian should constitute a satisfactory answer to the complaints and objections of petitioner could not be satisfactorily determined upon affidavits made in support of or to resist this proceeding. That the law has prescribed a different mode of investigation by allowing the party whose interests are affected by the charges, upon evidence taken in the usual way, to contest their legality and propriety; and, as petitioner was supplied with no adequate opportunity for doing so during his minority, that privilege under the authorities should still be accorded him. Dayton on Surrogates, 3d ed., 506-7, 543.

Order reversed, and order entered opening decrees.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

## REDEMPTION. LIEN.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People ex rel. Alfred Short et al., *appls.*, v. Orrin S. Bacon, late sheriff, *respt.*

Decided Jan., 1884.

A creditor whose judgment is procured after his debtor has made a general assignment for creditors has no lien on the debtor's real estate and is not entitled to redeem.

Appeal from judgment dismissing an alternative writ of mandamus.

Relators, as judgment creditors of one S., on the 20th of February, 1882, tendered to the sheriff the amount of a judgment in favor of one P., on which certain premises of S. had been sold, and demanded a deed thereof, which was refused, whereupon they procured the mandamus to compel him to execute and deliver such deed.

It is found as a fact that the premises in question were conveyed to S. by his father, in April, 1872, and that on October 5, 1876, in pursuance of an agreement made at the time of such conveyance, S. executed and delivered to his father a mortgage on said premises which was dated back; that on said 5th day of October, 1876, S., being insolvent, made and executed a general assignment of all his real and personal property for the benefit of his creditors, which was duly recorded and the assignee entered upon the discharge of his duties; that prior thereto and in August, 1876, P. recovered judgment against S., and that execution was issued thereon and sale of the premises made in November, 1880; that relator's judgment was recovered after the general assignment was made; that subsequently the mortgage was foreclosed, relators being made parties defendant; that they defended on the ground that the mortgage was fraudulent and void, but were unsuccessful and the mortgaged premises were sold to the mortgagee, who still holds the title. It was further found that no part of the premises had ever been retransferred to S.

The Special Term found as a conclusion of law that at the time of such tender and demanding the deed relator's judgment was not a lien on said premises, and that, in consequence thereof, they were in no condition to tender the same.

*Thos. M. Howell*, for applts.

*W. H. Silvernail*, for resp't.

*Held*, No error; there is no pretense that the assignment was fraudulent. It operated, therefore, to put out of the assignor the legal title to the premises, and when relator's judgment was docketed against him it did not become a lien upon the premises. 3 Cow., 69; *id.*, 35; 90 N. Y., 538; 46 *id.*, 577.

*Chautauqua Co. Bank v. Risley*, 19 N. Y., 370, and *Hurd v. West*, 7 Cow., 753, distinguished.

Assuming, as we may, from the findings of fact and the evidence, that the assignment contained the usual power of sale, there was vested in the assignee the legal title and the right to confer upon a purchaser a perfect estate in the lands. 2 Kern., 394. There had been no reconveyance by the assignee back to the assignor, as in the case of *Briggs v. Davis*, 20 N. Y., 16, modified in 21 *id.*, 574.

As *Miller, J.*, says, in *Spring v. Short*, 90 N. Y., 544, relators "had no lien upon the premises. The assignment stands in their way and presents an insuperable difficulty to maintaining" the right of redemption, which fails because they have no lien upon the premises. Chap. 410, *Laws of 1847*; Code Civ. Pro., § 1450.

Judgment affirmed, with costs.

Opinion by *Hardin, J.*; *Barker, J.*, concurs; *Smith, P. J.*, not voting.

### SHERIFFS. BONDS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Jas. P. Connor, exr., *respt.*, v. Martin Keese et al., *appls.*

Decided March 7, 1884.

A deputy sheriff and the sureties on his bond are not accountable to the sheriff for the consequences of an act explicitly directed by the latter, or by the undersheriff whom the sheriff has instructed his deputies to obey.

It seems that a deputy sheriff and his sureties on a bond which waives notice of any action brought against the sheriff for any act of said deputy, and stipulates that any judgment against the sheriff obtained therein shall be conclusive evidence of their liability to him, are not liable for the costs and expenses of appeals from said judgment to the General Term and Court of Appeals, unless they are notified of such appeals and their consent to prosecute them obtained.

Appeal from judgment entered upon verdict directed by the Court at Circuit.

This action was brought by the Sheriff of New York County against the defendant K., who was one of his deputies, and the other defendants as sureties on K.'s official bond, to charge them with the damages, costs and expenses incurred by the sheriff in an action brought against him for a false return to an execution made by K., and in the prosecution of appeals from the judgment therein to the General Term and the Court of Appeals. By K.'s bond his sure-

ties waived notice of any action brought against the sheriff for any act of K., and stipulated that any judgment obtained therein against the sheriff should be conclusive evidence of their liability to him. After the close of plaintiff's case defendants offered to prove that the sheriff had directed his deputies to obey all instructions of his under sheriff, and that the return made by K., for which the action was brought and the judgment obtained against the sheriff, had been made by K. in accordance with instructions received by him from such undersheriff. Defendants also offered to prove that the appeals taken by the sheriff were not requested or authorized by them. This evidence was excluded and a verdict directed for the plaintiff.

*E. Wilder*, for *appls.*

*Vanderpoel, Green & Cuming*, for *respt.*

*Held*, That a deputy sheriff and his sureties are not responsible to the sheriff for the consequences of an act explicitly directed by him, and that it was competent for the defendants to show that the return was made by the express direction of the undersheriff whom the sheriff had instructed his deputies to obey, and in such form as that the deputy acted simply in obedience to his instruction.

That it seems that the evidence by which defendants sought to show that the appeals to the General Term and the Court of Appeals were made without their authority or request should have been admitted. That the judg-

ment fixed the liability of defendants, and it would seem to have been the duty of the sheriff, if he intended to fall back upon the bond, to have called upon the deputy and his sureties to have determined whether or not they desired any further action in the nature of an appeal to be taken in the case. But that, without passing on that question, the judgment must be reversed on the grounds already considered.

Judgment reversed, new trial ordered.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### CIVIL DAMAGE ACT. DAMAGES.

N. Y. COURT OF APPEALS.

Neu, by guardian, *respt.*, v. McKechnie et al., *applts.*

Decided April 29, 1884.

A vendor of liquors is liable under the Civil Damage Act where the act by which plaintiff is deprived of his support was the result of intoxication, although not a natural consequence of the liquor sold. The cause of action is not taken away or mitigated because the injury also constitutes a crime. Defendants sold to plaintiff's father lager beer in quantities less than five gallons in violation of their license. In consequence of the intoxication produced in part thereby plaintiff's father murdered his wife and committed suicide. *Held*, That defendants were liable for the damages sustained by plaintiff for loss of support and that the case was one where exemplary damages might be awarded.

This was an action under the Civil Damage Act (Laws of 1873, Chap. 646). It appeared that at the time the alleged cause of action

accrued plaintiff was fifteen years old, living with his parents and dependent upon his father for support, when the latter in a state of intoxication, produced in part by the use of lager beer sold to him by defendants, murdered his wife and then committed suicide. The defendants were manufacturers of lager beer. They had no license to sell it in less than quantities of five gallons. The proof showed that they sold plaintiff's father and delivered at his house on the day of the murder a small keg holding less than five gallons and that they were in the habit of making sales in quantities less than five gallons. The jury rendered a verdict of \$600 for plaintiff. This verdict was affirmed by the General Term.

*Henry M. Field*, for applts.

*Wm. H. Smith*, for respt.

*Held*, That the conclusion of the jury is not open to review here. It was sufficient that the act which deprived the plaintiff of his father and of the support which he had before enjoyed was the result of intoxication, although not a natural consequence of the use of the beer sold by the defendants.

The statute does not even require that the vendor shall know that drunkenness leads to crime of any degree, nor even that it is the cause of beggary and poverty and consequent distress to the drunkard's family. 75 N. Y., 229; 74 id., 509; 87 id., 493. The cause of action is neither taken away nor mitigated because the injury also constitutes a crime.

The case was submitted to the

jury as one in which plaintiff might have exemplary damages.

*Held*, No error; that under the circumstances it was for the jury to say whether something more than actual damages should not be allowed for the benefit of the community and for example's sake, defendants having sold the beer without a license for their pecuniary profit. 56 N. Y., 321.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth*, J. All concur.

### NEGLIGENCE.

#### N. Y. COURT OF APPEALS.

Seybolt, admrx, *respt.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided April 15, 1884.

While the plaintiff in an action to recover for injuries has the burden in the first instance of showing defendant's negligence, he is not bound to establish a case free from reasonable doubt.

A railroad company owes the same degree of care to the clerks and mail agents riding in the postal car as it does to passengers in its other cars.

Plaintiff's intestate was a postal clerk who was transported under a pass issued by defendant pursuant to a requisition of a superintendent of the government mail service. *Held*, That intestate was not bound by the conditions on the pass exempting defendant from liability for negligence; that the pass was a mere voucher for the information of defendant's employees and the convenience of the agent and did not constitute a contract between defendant and the person using it.

Affirming S. C., 18 W. Dig., 405.

This action was brought to recover damages for the death of

S., plaintiff's intestate, who was killed in consequence of a train of cars on defendant's road being thrown from the track, which it was claimed occurred through defendant's negligence. Plaintiff showed a situation which could only have been produced by the operation of abnormal causes. At the closing of the case defendant's counsel requested the court to instruct the jury that the burden of proof was on plaintiff to establish defendant's negligence and if a reasonable doubt on the whole evidence exists of the negligence of defendant the verdict should be in its favor. The court refused this request.

*Lewis E. Carr*, for applt.

*J. F. Seybolt*, for respt.

*Held*, No error; that while the burden of showing negligence on the part of defendant rests in the first instance on the plaintiff, when such facts are shown as exist here the burden of proof changes and the onus rests upon the defendant to prove that the injury was caused without its fault. 47 N. Y., 291; 39 id., 227; 18 id., 534; 50 id., 121; 57 id., 572; 67 id., 597.

*Also held*, That a party in a civil action upon whom the burden of proof rests is not bound to establish a case free from reasonable doubt. 4 Greenl. on Ev., § 29.

It appeared that S., plaintiff's intestate, was an employee of the U. S. mail car. The court held that defendant owed the same degree of care to the clerks and mail agents riding on the postal car as it did to passengers riding upon the train.



*Held*, No error. 15 N. Y., 444; 66 id., 313; 96 Pa., 256.

It appeared that S. was transported under a pass, on the back of which was a stipulation exempting defendant from liability on account of injuries occurring through its negligence. This pass with others was issued on a requisition of one of the superintendents of the government mail service for passes for the employees of the postal service, which requisition it was customary to issue once a month. The evidence showed that defendant had transported the mails for a long time, but it did not appear whether this service was performed under an express or implied contract. The statutes under which such contracts are made (U. S. R. S., Chap. 10, Title 46, §§ 3997-4005) provide that every railroad company carrying the mail shall carry without extra charge all the mailable matter with the person in charge of the same. The compensation of the company is provided for and is graduated by the quantity of the matter carried and the distance over which it is to be transported.

*Held*, That an individual transported by a carrier of passengers may debar himself by a contract founded upon a sufficient consideration from any claim to damages for injuries to his person or property occasioned by the negligence of such carrier during the course of transportation. Such a contract to be binding upon a party must be made by him or some one authorized to act in his behalf. Such authority may some-

times be implied from certain contract relations existing between the parties, as between master and servant or principal and agent, but no such implication can arise where the relations of the parties are regulated and defined by statute. 32 N. Y., 333; 66 id., 313. Under the circumstances presented the pass issued to plaintiff's intestate was a mere voucher, issued for the convenience of the agent and the information of defendant's employees and did not constitute in any sense a contract between defendant and the person using it.

The rule that a person who voluntarily accepts a ticket or a receipt purporting to contain the conditions of the contract for the transportation of persons or property is thereby deemed to have assented to such conditions has no application to this case.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Rugger, Ch. J.* All concur.

## SERVICES.

### N. Y. COURT OF APPEALS.

McCarthy, *applt.* v. The Mayor, &c., of N. Y., *respt.*

Decided April 29, 1884.

The eight hour statute leaves the rate of wages open to be fixed by the agreement of parties intending to enter into the relations of employer and employee. Extra labor cannot be required nor extra compensation demanded unless an agreement therefor has been previously made by the parties.

Where an employee enters upon the employ-

ment understanding that ten hours labor per day are required, and that the duration of his labors are dependent on extraneous circumstances an agreement to give him extra compensation cannot be implied.

This action was brought to recover for work, labor and services rendered by plaintiff for defendant. He was employed by the Superintendent of the Department of Docks as a scowman, at \$2.50 per day, from June 27, 1874, to March 4, 1876. At the end of every two weeks during that time he received payment for his services at the rate of \$2.50 per day, signing a pay roll containing a receipt in full. He now seeks to recover for two hours extra work rendered upon each day, alleging that he worked ten hours in each day and also 141 hours in addition. No claim was made by plaintiff for extra wages until about three years after the last payment.

*Denis A. Spellissy*, for applt.

*D. J. Dean*, for respt.

*Held*, That a promise to pay for the extra hours cannot be implied; that the "eight hours statute," Laws of 1870, Chap. 385, leaves the rate of wages open to be fixed by the agreement of the parties intending to enter into the relations of employer and employee. The intent of the act was to place the control of the hours of labor within the discretion of the employee, and give him the privilege, at his option, of declining to work beyond the time fixed by the statute, or if he did so work to authorize him to secure extra compensation for extra work by stipulation for it in the contract of

employment. Neither extra labor can be required nor extra compensation demanded unless an agreement therefor has previously been made by the parties.

Plaintiff entered into the employment with knowledge and understanding of the custom of the department requiring ten hours labor in each calendar day's employment, and that his services as a scowman were to be rendered mainly upon the water, and the duration of the hours of labor would necessarily depend on the action of the wind and tide.

*Held*, That an agreement could not be implied from the circumstances in this case to give him extra compensation. Such an implication arises only when the services are rendered under circumstances authorizing an expectation of compensation therefor, or the inference that they would not otherwise have been rendered. 5 Cow., 531; 3 N. Y., 312; 14 Wend., 209; 4 Otto, 403; 37 Conn., 219; 48 N. H., 50.

Judgment of General Term, affirming judgment on verdict for defendant, affirmed.

Opinion by *Ruger*, *Ch. J.* All concur.

## FORGERY. EVIDENCE.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. D'Argencour, *applt.*

Decided April 29, 1884.

On an indictment for the forgery of bank notes the incorporation of the bank may be proved by testimony of the most general

character and it is not necessary to produce the act of incorporation or the law under which it was incorporated.

Testimony of the engraver of the American Bank Note Co. that said company engraved the plates from which the genuine notes were printed and that such plates were in the vaults of the company is sufficient to show that defendant had no authority to make the plate alleged to be forged.

A failure to charge an intent to defraud in an indictment for forgery in the second degree, committed before the Penal Code went into effect, is not a fatal defect.

Affirming S. C., 18 W. Dig., 532.

The defendant was indicted for forgery in the second degree, and convicted on the first count in the indictment. This charged that defendant made and engraved and caused and procured to be made and engraved a plate in the form and similitude of a promissory note issued by a bank in Havana, Cuba, for the payment of fifty centaros, said bank being incorporated under the laws of Spain, without the authority of said bank. The only evidence of the incorporation of said bank was the testimony of a witness for the people, who swore that he was a banker in New York city, and had been in the bank named in the forged note; that said bank issued notes which were received as money; that his firm were agents of said bank in the city of New York; that when he was in said bank he saw banking business carried on. He also swore that the bank was incorporated under the laws of Spain; that he saw the articles of incorporation in a book which was in the court room the day of the trial; that from what he saw there and also from what he saw in

the official organ, the paper of the Spanish government, he believed it to be so; that said paper was published by the government and only contains official news, the chief laws, and any change in the administration that interests the public. The engraver connected with the American Bank Note Co. testified that said company engraved the plates from which the genuine notes of the bank were printed and which plates were then in the vaults of said company.

*Wm. F. Kintzing*, for applt.

*Peter B. Olney*, Dist.-Atty., for respts.

*Held*, That the evidence was sufficient to show the existence of the bank, without producing the law to establish the fact that the bank had been incorporated and the act of incorporation.

On an indictment for the forgery of bank notes it is not necessary to prove by direct evidence the incorporation of the bank. Testimony of the most general character is sufficient for such a purpose. 21 Wend., 309.

The provisions of the Code of Civil Procedure, §§ 942, 956-958, as to proving documents have no application to an indictment for counterfeiting bank notes.

*Also held*, That it was not necessary to set forth in the indictment the meaning of the word *centaros*.

*Sanabria v. People*, 24 Hun, 270, distinguished.

*Also held*, That the testimony of the engraver of the American Bank Note Co. was sufficient to

show that defendant had no authority to make the plate alleged to be forged.

The indictment charged an offense in violation of §§ 30 and 31 of 3 R. S. (7th ed.), 2488. No intent to defraud was charged. The offense was committed in September, 1882, before the Penal Code went into effect. It was claimed that a failure to charge an intent to defraud was a fatal defect in the indictment.

*Held*, Untenable.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Miller, J.* All concur.

## SECOND OFFENSE. SENTENCE.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Raymond, *applt.*

Decided April 29, 1884.

Defendant was convicted of forgery in the first degree in having disposed of a forged coupon. There was proof that the coupon had been altered, the number having been changed. *Held*, That the evidence was sufficient to show an intent to defraud.

To bring a case within the provisions of § 688, Code Crim. Pro., it is not necessary that the second offence shall be of the same character or grade as the first.

Defendant had previously been convicted of forgery in the third degree. *Held*, That as defendant had previously been convicted of a felony, the life penalty on a second conviction was not discretionary, but imperative.

Affirming S. C., 18 W. Dig., 537.

The defendant was convicted of forgery in the first degree, second offense, and was sentenced to be

Vol. 19—No. 6b.

imprisoned in the State Prison for life. The first conviction was on March 19, 1877, of forgery in the third degree, and the accused was sentenced to the State Prison for five years. The indictment charged that on September 1, 1883, defendant, with intent to defraud, disposed of a forged coupon of the Union Pacific R.R. Co. There was proof tending to show that the coupon in question had been altered, the number having been changed.

*James Johnston*, for applt.

*John Vincent*, for respts.

*Held*, That the evidence was sufficient to show an intent to defraud on the part of the accused.

*Also held*, That the first offense of which the accused was convicted was not an element of, or included in the second, but was simply a fact in his past history, which the law takes into consideration when prescribing punishment for the second offense.

*Also held*, That, under section 688 of the Code of Criminal Procedure, the accused having been previously convicted of a felony, the life penalty was no longer discretionary but imperative. To bring a case within the provision of said section it is not necessary that the second offense shall be of the same character and grade as that which resulted in the first conviction. Code Cr. Proc., § 689.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Finch, J.* All concur.

## DEVISEES. FRAUD.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Wilt Wakeman Morris et al.,  
*respts.*, v. Henry D. Morris, *applt.*

Decided March 7, 1884.

A devisee under a will can maintain an action to set aside conveyances made by the testator during his life time, subsequent to the date of his will, as having been obtained from said testator by undue influence and in fraud of the rights of such devisee under the will, without previously procuring the admission of the will to probate.

Appeal from an interlocutory judgment overruling a demurrer to the complaint.

This action was brought by plaintiffs as devisees under the will of Eliza Wilt to set aside certain conveyances of the real property devised to them by the will made by the testatrix subsequent to the date of the will and which plaintiffs alleged were obtained from her by undue influence and in fraud of their rights under the will. The complaint was demurred to as not containing facts sufficient to constitute a cause of action, principally for the reason that it appeared upon its face that the will of the testator had never been probated or offered for probate.

*Sullivan & Cromwell* for applt.

*William G. Choate*, for respt.

*Held*, That before the enactment of the Statute providing for the proof of wills in Surrogate's or other courts no proceeding of that nature was essential to the right of the party to maintain such an action, but the right could well be asserted under the provisions of

the will, and proof of its execution might be made as a part of the evidence in the action for the recovery of the property or the establishment of the rights claimed to be secured or created under it, Greenleaf on Evidence, 5th Ed., § 672; 19 Johns., 386; *id.*, 12, 192; 5 Cow., 221; 1 Wend., 407; 4 *id.*, 278; 4 Paige, 623; that by no provision of the Statute conferring authority to take proof of the execution of a will has this preceding right secured by the common law been taken away, and the party, therefore, whose title to real property is dependent upon a will may still proceed in that manner although the will itself may not have been formally proved before the Surrogate.

Judgment affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

## MANDAMUS. SURROGATES.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

The People ex. rel. Richard J. Morgan et al., v. The Surrogate of the County of New York.

Decided March 28, 1884.

When a Surrogate declines to exercise a conceded jurisdiction, and to act until the happening of a contingency which may never happen, for an inadequate or indefensible reason, a writ of mandamus may properly issue to command the Surrogate to exercise jurisdiction with respect to such matters within his jurisdiction upon which he declines to act.

Motion for a writ of peremptory mandamus.

Upon the settlement of the ac-

counts of the executrix of the estate of Charles Morgan, deceased, it was claimed by the contestants that certain alleged gifts of stock to certain of the children of the testator and legatees under the will were invalid by reason of undue influence and fraud practiced upon the testator, and that such stock should be regarded as assets of the estate; and further it was claimed that such alleged gifts were advances and went in ademption of the legacies to said alleged donees. The Surrogate of New York County decided he had not jurisdiction to pass upon the question of the validity of the gifts, which was dependent upon the question as to whether fraud and undue influence had been practiced upon the testator, and that he, as a matter of expediency, declined to pass upon the question as to whether the advancements went in ademption of the legacies until by a suit in equity brought by some of the parties interested the question had been determined as to whether the gifts were valid. The relators, who were interested in the estate, applied for a writ of peremptory mandamus to require the Surrogate to pass upon the question upon which he declined to pass as to whether the alleged gifts were advances which went in ademption of the legacies respectively, to the end that there might be a complete and full settlement of the affairs of the estate.

*F. N. Bangs*, for relators.

*John S. Davenport*, for executrix.

*Held*, We do not think the decis-

ion of the Surrogate with respect to his jurisdiction to pass upon the validity of the gifts can be reviewed or that any different adjudication can be properly compelled by writ of mandamus. But although the question is not free from doubt, we think that the writ would be awarded to compel the Surrogate to pass upon the question as to whether the alleged gifts were in fact advancements to the several donees made by the testator in ademption of legacies bequeathed to them respectively by his will. This question was clearly within the jurisdiction of the Surrogate in the proceeding before him, but he has ruled as a mere question of expediency that inasmuch as the other question cannot be tried by him for want of jurisdiction, he will decline all action on the questions of advancement and ademption until the question of fraud and undue influence in obtaining the stock shall be first determined by some other court of competent jurisdiction.

The application for mandamus relates solely to this conclusion, and the questions presented whether the declining to proceed and dispose of the question of which he has jurisdiction is such a judgment as can only be reviewed by appeal or such an exercise of discretion in a judicial proceeding as precludes the interference of this court by a writ of mandamus.

On such a settlement as is sought in these proceedings, the parties are entitled to a full determination of all the questions touching the disposition of the property of the

testator of which the Surrogate has clear jurisdiction, and neither party has a right, upon a mere suggestion that another controversy may arise in some other tribunal which will affect a portion of the estate, to arrest the action of the Surrogate till a suit over such controversy which may never be begun shall be instituted and disposed of, thus indefinitely arresting the settlement of the affairs of said estate.

Writ awarded.

Opinions by *Davis, P. J.*, and *Daniels, J.*; *Brady, J.*, concurs.

#### STAY.

N. Y. SUPREME COURT. GENERAL TERM, FIRST DEPT.

Ferdinand Jung, individually and as assignee, *applt.*, v. Moses May, *respt.*

Decided March 7, 1884.

Proceedings will be stayed in an action brought by an assignee under a general assignment to have a portion of a decree made upon his accounting charging him with certain sums payable to defendant declared satisfied by a compromise with said defendant, when it appears that, prior to the commencement of such action, the defendant therein had commenced an action against the assignee and the sureties on his bond to secure the performance of the trusts created by the assignments in which the assignee had interposed an answer alleging payment of defendant's claims under the terms of the said compromise.

Appeal from an order staying plaintiff's proceedings in this action.

This action was brought by plaintiff, as an assignee under a

general assignment, to have a portion of a decree made upon his accounting declared satisfied so far as it charged him with the payment of certain sums to defendant, by a payment of the same under the terms of a compromise entered into by him with defendant. The stay of proceedings was asked for on the ground that, previous to the commencement of this action, an action had been commenced by defendant against plaintiff and the sureties on his bond to enforce performance of the trusts created by the assignment, in which plaintiff had interposed an answer setting up payment of defendant's claims under the terms of the said compromise.

*Benjamin M. Stillwell*, for *applt.*

*Ira Leo Bamberger*, for *respt.*

*Held*, That the right of the parties in each action depended upon the same state of facts, and that plaintiff could be fully protected by establishing the defence contained in the answer of himself and his sureties in the suit brought against them by defendant. That the concurrent prosecution and defence of both actions could not regularly be permitted; and that, since defendant's action was first commenced, he was entitled to have it first tried and the proceedings in this action in the meantime stayed. 12 Hun, 149.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## ASSESSMENTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Franklin H. Delano, trustee, *applt.*, v. The Mayor, &c. of the City of New York, *respt.*

Decided March 7, 1884.

An owner of real property in New York City who has paid an assessment on such property, which was not void upon its face, may maintain an action against the city to recover back a portion of such assessment which has been adjudged to have been illegally imposed in a proceeding instituted by another person owning property subject to the same assessment, although such portion of said assessment has never been adjudged to be invalid as against the plaintiff in a direct proceeding brought by him to review the same.

Motion for judgment upon a verdict directed by court below subject to opinion of General Term.

In 1847 the Common Council of New York city granted to the Hudson River R.R. Co. the right to lay a track in Eleventh avenue provided it should grade, regulate, pave and keep in repair a space 25 feet in width in and about its tracks. The railroad company never paved any part of Eleventh avenue, and in 1875 the avenue was paved by the city and the whole cost thereof was assessed upon the property fronting on said avenue, and no part of such cost was assessed upon the railroad company. Plaintiff was the owner of real property fronting on Eleventh avenue, and his agent, who was ignorant of the duty of the railroad company to contribute toward the expense of such

pavement, paid the full assessment upon such property. Subsequently it was adjudged, in a proceeding instituted by one Appleby, 6 Hun, 427, that a portion of the expense of the pavement should have been assessed upon the railroad company and that the imposition of the whole expense upon the property owners was illegal. Plaintiff then began this action to recover back the amount paid by his agent in excess of what the assessment should have been. It was contended on the part of the city that the action could not be maintained, for such an action could only be maintained either when the assessment was void upon its face or when it had been adjudged to be invalid as against the plaintiff in a direct proceeding brought by him to review it.

*John C. Shaw*, for *applt.*

*David J. Dean*, for *respt.*

*Held*, That plaintiff at the time of the payment had no personal charge of the property and his agent who made it was ignorant of the duty of the railroad company to pay part of the tax and of the failure of the city to charge such company with its proportion of the expense, and inasmuch as the imposition of the whole expense upon the property subject to the assessment had been declared to be illegal, and it had on application been reduced, it was established, if not conceded, that a sum in excess of what the city was entitled to had been paid into its treasury, and the action to recover it back could therefore be maintained upon the authority of



Strusburgh v. Mayor, 87 N. Y., 452.

Judgment ordered for plaintiff.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

### NEGOTIABLE PAPER.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Willard Muzzey, *respt.*, v. Wm. G. Cable, *applt.*

Decided Jan., 1884.

The recital in a promissory note that it was given for value received and a seal attached thereto are each presumptive evidence that the note was given for a valuable consideration, and to overcome such presumption evidence must be produced that there was no consideration.

The fact that the note was given by the maker to his wife will not of itself overcome such presumption.

Appeal from judgment in favor of plaintiff, entered on the report of a referee.

Action for conversion of personal property which was covered by a chattel mortgage to plaintiff.

In June, 1878, one C. gave to his wife, Emma, a promissory note under seal for \$500, which note recited that it was given for value received. Plaintiff, in Aug., 1879, purchased this note under an agreement with C. that the latter would execute a chattel mortgage to secure it. C. accordingly executed a mortgage covering the property in question and plaintiff paid \$350 towards the purchase price. Defendant gave no evidence to show a want of consideration for the note or mortgage.

*Walter L. Sessions*, for applt.

*C. R. Lockwood*, for respt.

*Held*, That proof of the signature to the sealed note was sufficient to raise the presumption that it was duly sealed, though nothing is stated in the body of the note indicating a seal. 1 E. D. Smith, 335; that the recital of value received and the seal attached to the note are and each is presumptive evidence that the note was given for a valuable consideration, and that to overcome such presumption evidence must be produced that there was no consideration for the note. 14 Hun, 198. It was, therefore, as the case stood, for the referee to follow the presumptions arising from the production of the note in evidence. The circumstance that the note was given by C. to his wife did not, of itself, overcome the presumption. If there had been evidence of a want of consideration for the note, or of its fraudulent inception, due weight might have been given to the circumstance. But the burden of showing a want of consideration for the note or fraud in its inception was upon defendant, and he gave no evidence thereof and the presumptions were properly allowed to support the conclusion that the note was valid in its inception and the proper foundation for the chattel mortgage and its good faith. 17 Hun, 327; 59 N. Y., 390; 10 Hun, 591; 1 F. id., 224; 14 id., 278.

Seeing that the chattel mortgage was given to secure a note given for a valuable consideration, it was competent for the referee to find that the chattel mortgage was

given in good faith and operated as a valid security of the note. Having a valid chattel mortgage upon the property, properly executed and filed before defendant's lien attached, plaintiff was entitled to the possession of the property, and the conversion of it by defendant was unjustified.

If the consideration of the note and mortgage had been properly challenged at the trial plaintiff might have given further evidence on that subject. Defendant is not in a situation now to say that the note and mortgage were given without consideration. 44 N. Y., 415; 58 id., 541; 3 Hun, 598.

Had the referee found upon the evidence before him that there was no consideration for the note and the chattel mortgage his finding would have been against the evidence and without any evidence to support it, and it would have been our duty to reverse. 55 Barb., 293.

Judgment affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*; and *Barker, J.*, concur.

#### PARTNERSHIP. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Metropolitan Natl. Bk., *plff.*, v. William B. Sirret, *implyd.*, *deft.*

Decided Jan., 1884.

One S., a general partner in a firm, desired to become a limited partner and procured a friend to temporarily purchase the stock of the firm, loaning him his check for the amount required. The friend thereupon

purchased the stock and gave the check to the firm, which paid it over with other checks to the amount of \$40,000 to S., who then gave a check for \$40,000 as his capital to the new firm. The stock was then repurchased by the new firm for the same price and payment made by check, which was returned to S. in payment for the one loaned. In an action on a note given by the firm, which S. defended on the ground that he was only a special partner, the court excluded evidence offered to show that the bank account of S. was made up of county moneys deposited by S. as County Treasurer. *Held*, Error; that the evidence offered was competent on the question of the good faith of the transaction.

Motion for new trial after verdict for defendant on exceptions ordered heard in the first instance at General Term.

Action upon a promissory note dated Aug. 12, 1878, made by the firm of Sirret & Stafford, and the complaint alleged that said firm was composed of Wm. B. Sirret, Lucian A. Sirret and Robert Stafford. The execution of the note was not denied, but the answer of Wm. B. Sirret alleged that said firm was a limited partnership and that he was only a special partner.

The facts in relation to the formation of said partnership shown on this trial were similar to those shown in action No. 1 between the same parties, reported in 15 W. Dig., 289.

In the course of the trial plaintiff offered to show that "the account of Wm. B. Sirret with the Third National Bank, on which his check was drawn, was made up of county moneys, funds received of Wm. B. Sirret as County Treasurer belonging to the county." This was excluded.

The court refused to direct a

verdict for plaintiff, and submitted to the jury the question whether the check given by Wm. B. Sirret as his share of the capital was contributed to the firm before Dec. 28, 1875, at 2 P. M. The jury rendered a verdict for defendant and answered the question in the affirmative.

*Morey & Iglehart*, for deft.

*Wm. B. Hornblower*, for plff.

*Held*, That the decision in action No. 1 should be followed in this case. 15 W. Dig., 289. See also 28 Hun, 222.

*Also held*, That the court erred in excluding the evidence offered; that if it had been received it would have tended to strengthen the evidence offered by plaintiff to show that there had not been a cash contribution in good faith by the special partner at the time of the attempted organization of a limited partnership. In effect the offer was to show that Sirret took out of moneys in his account belonging to him in his official character as treasurer a sum sufficient to enable him to make a temporary loan to Stillman to put him in funds to buy the stock and to hold the same temporarily before transferring the same back to the limited partnership and that the transaction was not *bona fide*. That the trust funds could have been followed and reclaimed by the county in the hands of either Stillman or the firm if the treasurer failed to restore them to the county. See 52 N. Y., 1; 2 De G., M. & G., 903; *National Bank v. Ins. Co.*, 104 U. S.

New trial ordered.

Opinion by *Hardin, J.; Smith. P. J.*, and *Barker, J.*, concur.

## INJUNCTION. CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James C. Jewett, *applt.*, v. James Swann et al., *respts.*

Decided March 7, 1884.

A stockholder, who claims that voluntary proceedings to dissolve a corporation are being taken by the directors in bad faith and for fraudulent purposes and with the intent to defraud him of his rights as such stockholder, is not entitled to a temporary injunction in an action brought by him to restrain such proceedings when the equities of his case are fully met and denied by opposing affidavits.

All the questions raised by such an action can be fully presented in the proceedings taken to dissolve such corporation under §§ 2419-2431, of the Code of Civ. Pro., for such proceedings cannot go on without notice to the plaintiff in such action, and he can then come in and oppose the dissolution upon any of the grounds upon which he seeks to restrain it in the action brought by him.

Appeal from order of Special Term dissolving so much of a temporary injunction as restrained defendants, as officers of the Guiana Phosphate Co., from taking proceedings to wind up the company as an insolvent corporation under §§ 2419-2431 of the Code.

This action was brought by plaintiff, as a stockholder of said company, to restrain the said proceedings upon the ground that they were taken in bad faith and for fraudulent purposes and with the intention of defrauding plaintiff of his rights as such stockholder. These allegations were

denied by defendants in affidavits read in opposition to the motion to continue the temporary injunction granted in the action, and such injunction was partially dissolved.

*J. S. Auerbach*, for applt.

*S. P. Nash*, for respt.

*Held*, That all the questions raised by this action can be fully presented in the proceedings to dissolve the corporation under the sections of the Code, *supra*; that plaintiff can come in and oppose the dissolution upon any of the grounds upon which he seeks to restrain it in this action, for the proceedings cannot go on without notice to him and an opportunity to be heard in opposition, and he can then establish the alleged frauds.

That the equities of plaintiff's case were fully met and denied, and although upon the allegations of his complaint, if established, plaintiff may be entitled to some relief, his alleged right to a temporary injunction was not sustained.

Order affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### EXECUTORS. REFERENCE. COSTS.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Wesson Miller, *applt.*, v. Mary  
A. Miller, *exrx.*, et al., *respts.*

Decided May, 1884.

Where a claim disputed by executors is referred under the statute, disbursements to the party prevailing on the reference are  
Vol. 19—No. 7.

no longer a matter of right, but are in the discretion of the Court.

This was a reference under the statute of a claim rejected by executors. Plaintiff recovered. The Court denied costs and disbursements to either party. Plaintiff appeals.

*George Ade*, for applt.

*Davie & Arbuckle*, for respts.

*Held*, That disbursements to the prevailing party in such a proceeding are no longer a matter of right. They were so under Old Code, § 317. But § 3246 of the New Code takes the place of § 317, and disbursements are now to be awarded as provided in §§ 1835 and 1836.

Order affirmed, with \$10 costs.

Mem. by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### SLANDER. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Mary Blanchard, *respt.*, v. Lewis  
Tulip, *applt.*

Decided May, 1884.

Facts which go in mitigation of damages must be pleaded in slander. Therefore, *Held*, that, where no mitigation was pleaded, evidence as to plaintiff's reputation for chastity was properly excluded.

The action was for slander, in charging plaintiff, a married woman, with unchastity. The answer was a denial and an allegation of the truth of the charge. On the trial the referee excluded this question: "Do you know the general reputation of the plaintiff in respect to chastity in the community previous to 1882." The slander

was uttered in 1882. Plaintiff recovered.

*J. B. Riley*, for applt.

*Beckwith, Barnard & Wheeler*, for respt.

*Held*, That the answer to the question was properly excluded. The evidence, if material, was only so in excusing defendant for uttering the words and thus to mitigate damages. Therefore the facts in mitigation should have been pleaded. 72 N. Y., 36; Code, § 536.

Judgment affirmed, with costs, Mem. by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### EXECUTORS. POWER OF SALE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Elizabeth Ramsey, respt.*, v. *Stephen S. Wandell et al.*, admsrs., *appls.*

Decided May, 1884.

Where a will gives executors power to sell and convey real estate they are not thereby authorized to contract to convey it with covenants.

Such a power can be executed without any covenants, either express or implied, and a power is to be strictly construed.

The complaint alleged, in substance, that S. died and left a will "by which his executors were authorized and empowered to sell his real estate;" that the executors, by virtue of said power, made a contract to sell certain premises of the testator free and clear of incumbrances; that the premises were not clear, and that by the foreclosure of an outstanding mort-

gage plaintiff was damaged. Defendant demurred. Demurrer overruled.

*Smith, Fursman & Cowen*, for applts.

*Mead & Halt*, and *E. Countryman*, for respt.

*Held*, Error. The real question is whether a power given by a will to executors to sell and convey land authorizes them to contract to convey with covenants. No cases in point are cited by respondents. The cases of *Le Roy v. Beard*, 8 How., U. S., 451, and *Bronson v. Coffin*, 118 Mass., 156, arose between principal and agent. The executors are in no sense agents of the deceased. A power over land must be governed by Art. 3, 1 R. S., m. p., 732. No express covenants are required. There are no implied covenants, 1 R. S., m. p., 738, § 140, and therefore there can be a conveyance without any covenants, express or implied. Hence the power could have been executed without agreeing, expressly or impliedly, that the land was free from encumbrances. And a power is not to be enlarged by construction.

We may add that the rule is that contracts made by executors do not bind the estate. 41 N. Y., 315; 47 N. Y., 366.

Judgment reversed, with costs, and judgment for defendants, with costs, with leave, &c.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

John A. O'Reilly, *respt.*, v. The Corporation of the London Assurance, *applt.*

Decided Jan., 1884.

A parol agreement to renew a policy, made by an agent who has power to issue, renew, &c., is valid and binds the company. A retention of the proofs of loss by the company without objection except that it is not liable is a waiver of objection as to defects in the proofs or as to the time of their presentation.

Where there is an open account between the agent and the assured in which it has been customary for the premiums to be charged a failure on the part of the assured to pay the premium at the time of the agreement to renew is no defense to an action on such agreement.

A failure of the agent to charge such premium or to account for it to the company cannot affect the rights of the assured.

Appeal from judgment in favor of plaintiff, entered upon the report of a referee.

Action to recover upon an agreement to renew a policy of fire insurance.

The evidence tended to show that one C. held a policy in the defendant company for \$1,500 which expired Aug. 14, 1880; that a short time before its expiration an agreement was made by defendant's agent J. to renew it for one year for a premium of \$15; that C. and J. had an open account between them which was settled once a year and that premiums were brought into such account and settled for; that defendant did not issue a new policy or give a renewal receipt, the agent having

forgotten to renew the policy; that the premises were destroyed by fire Feb. 2, 1881; that about Aug. 1, 1881, proofs of loss were sent to the defendant and retained by it without any other objection than that it was not liable. C. assigned his claim to plaintiff. The agent never demanded the premium. He knew of the loss and told plaintiff that C. was not insured.

*Louis Marshall and Foster & Thomson*, for *applt.*

*Jay B. Kline*, for *respt.*

*Held*, That defendant under the circumstances waived the defects in the proofs of loss and any question as to whether they were presented timely. 73 N. Y., 496; 81 *id.*, 416; 80 *id.*, 115.

The agent had a written power of attorney which gave him full power to receive proposals for insurance, fix rates, issue, renew and consent to the transfer of policies for defendant.

*Held*, That his right to bind defendant by an agreement to renew the policy cannot be doubted, and that what he said and did in regard to the agreement of renewal was as the agent of defendant and not as agent of the assured. 68 N. Y., 434.

*Sargent v. Ins. Co.*, 86 N. Y., 626, distinguished.

Defendant was a foreign corporation and fully represented where this contract was made by the agent, and his agreement to renew was the agreement of defendant. 81 N. Y., 276. The contract of defendant was to issue a new and binding policy and that

contract it was competent for it to make by parol, and though the agent omitted to put it in writing defendant was bound. In the power of attorney the agent was restricted from giving credit or time to pay premiums, but there is nothing to show that the assured had notice nor that the agent had not such power and discretion as he had before exercised as to credit, and the omission of the assured to pay the premium at the time the agreement was made cannot avail defendant as a defense. 59 N. Y., 171; 19 id., 305; 50 id., 402; 1 T. & C., 397. It was the duty of the agent to make out and deliver the renewal receipt and ask and receive the premium therefor as cash if he intended to have the validity of the agreement to insure depend upon actual payment and to put an end to the credit implied from the terms of the renewal agreement. 24 Hun., 133. An oral consent to give credit or a contract of renewal with a condition in it allowing credit or time to pay the premium, or a consent that the same be charged in the open account between the assured and the agent and forming a part of a parol agreement to renew the policy, is valid. See 73 N. Y., 11. The assured acted, in making the agreement, upon the supposed authority of the agent to bind the principal and that, as well as the actual authority of the agent, concludes defendant. 73 N. Y., 11.

That from the terms of the agreement there is an implication that the premium should be charged to

assured in the open account and a credit thus given the assured, or that it should be brought in and settled when the open account was settled. We do not see any fraud upon defendant in such an agreement.

*Hoffman v. Ins. Co.*, 92 N. Y., 161, distinguished.

*Also held*, That the fact that the agent did not charge the premium in the account or report the premium or pay it to defendant was not a fatal barrier to a recovery. The assured or his assignee is not to be prejudiced by such delinquencies of an agent.

*Also held*, That it was too late to object to the report on the ground that the referee failed to take an oath before entering upon his duties. Code Civ. Pro., § 721; 26 Hun., 429.

Judgment affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

#### DECEDENT'S ESTATE. ES- TOPPEL.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

*In re* distribution of surplus moneys of estate of John Logan, deceased.

Decided Jan., 1884.

Where in a proceedings to distribute surplus moneys arising on a sale of real estate of a decedent, it is stipulated that the claim of a creditor may be paid in full without abatement, such creditor should not be permitted to carry on a contest over the claims of other creditors.

Where the claim of a creditor against the es-

tate of a decedent is submitted to arbitration with the consent of the administratrix and heirs at law the award therein is final and bars the administratrix and heirs from further litigation over the claim.

Appeal by James Logan, as claimant, from so much of an order made by the Surrogate of Monroe Co. as refused to confirm the report of a referee allowing his claim.

Intestate died in 1880, leaving a widow and three sons, James, William and Thomas. He left no personal estate, except such as was exempt. He held an interest in real estate under a contract of purchase. After his death the contract was foreclosed and a sale had, which resulted in a surplus of \$2,703, which was paid to the Surrogate in pursuance of § 2798 of the Code. The widow was appointed administratrix.

James made claim against the estate of \$2,847.21. The other sons having objected to the claim it was agreed in writing to submit it to the arbitration of five neighbors. The submission was executed by the widow as administratrix and the three sons, and in it all of them stipulated "to accept and abide by the decision of the referees or a majority of them; James agreeing to present a claim for the exact amount awarded and the widow agreeing to pay only such amount. The arbitrators united in an award of \$2,078.34, and James thereupon presented a petition praying for a citation that he might be adjudged to receive payment of his claim for that amount.

One A., a creditor of deceased,

commenced proceedings under § 2799 of the Code for distribution of the surplus, and in his petition stated that the only creditors were himself and James. On the return day the claim of James was disputed by his two brothers and the Surrogate referred the claims to a referee, who reported that there was due to A. \$535.50 and to James \$2,160.42, and that if there was not enough of the surplus to pay both claims in full they should share pro rata.

On motion to confirm A. asked permission to file objections to James' claim and he and James' brothers asked a further hearing before the referee, which was granted on terms. On the second hearing James stipulated that A's claim should be paid in full before anything was paid on his claim. Thereupon the referee again reported in favor of the claims as before and also the substance of the stipulation.

The Surrogate refused to confirm the report, except as to the claim of A., and ordered the claim of James sent back to another referee to take proofs *de novo*. From this part of the order this appeal is taken.

*Smith & Briggs*, for applt.

*Donald McNaughton*, for William and Thomas Logan.

*William Olmstead*, for respt. A.

*Held*, Error; that under § 2790, Code Civ. Pro., where stipulation is given like the one offered before the referee in this case, and there is no further occasion or right in creditors situated as A. was in re-



spect to this fund to carry on a contest, it is sufficient for him that the proceedings necessarily must result under the stipulation in a satisfaction in full of his debt out of the proceeds thus to be distributed; and that the stipulation justified the referee in refusing to allow A. to carry on a further contest of the claim of James against the estate.

That as to William and Thomas Logan the submission and award under the circumstances disclosed were final, and the award as to them is as effectually a bar to further litigation as a judgment rendered between the creditor and themselves as heirs at law establishing the claimant's debt would be. 62 N. Y., 299; 10 Ohio St., 512; 2 Barb. Ch., 430. After the award was made they were estopped, either as individuals or heirs at law, from questioning the claim of their brother. 2 Seld., 44; 12 N. Y., 9; 2 Hill, 272.

The award is not impaired by the circumstance that the submission was joined in by the administratrix. We do not understand her as questioning the award upon the claim of James nor in any other respect; nor do we understand that she is in any situation to question it after having united in the submission as administratrix. 74 N. Y., 38; 1 Barb., 519; 17 W. Dig., 568.

That the referee did not err in refusing to receive in evidence the minutes of evidence taken before the arbitrators. The submission was general; the award was for a

gross sum and was definite and there was no averment of fraud, corruption or partiality. The referee was justified in treating the award as final and conclusive upon the claim of James against the estate and as sufficient to conclude the administratrix, who with her two sons had joined in the submission to arbitration. 23 Barb., 187; 74 N. Y., 38; 2 Hill, 272; 66 Barb., 210.

That the Surrogate erred in supposing the arbitration was made "to accomplish what might have been accomplished by the administratrix under the statute in relation to disputed claims presented to legal representatives of an estate by a creditor." If that was the sole object of the submission it is difficult to see why the heirs at law are required to join in its execution.

Part of the order appealed from reversed, with costs, and proceedings remitted with directions to confirm the report and distribute the fund in accordance therewith.

Opinion by *Hardin, J.*; *Barker, J.*, concurs; *Smith, P. J.*, not voting.

#### PROTEST. WAIVER. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Andrew Holliday et al., *respts.*,  
v. Lathrop S. Sprague, impld.,  
*applt.*

Decided Jan., 1884.

A waiver of notice of protest may be made by parol and is good even when made upon

the day of maturity of the note, and a promise to pay made after knowledge of laches in respect to a demand or notice is good.

G., one of the defendants, who had endorsed the note in question, testified that he was authorized by the other to do so and on cross examination denied that he had asked one T. to see the co-defendant and get his permission to use the note by turning it out to plaintiffs. T. was then called and asked if G. did not ask him to see S. and get his permission to use the note. This was objected to and excluded. *Held*, Error.

Appeal from judgment in favor of plaintiffs, entered on verdict and from order denying motion on the minutes for a new trial.

Action against defendants S. & G. as endorsers of a promissory note for \$130 made by one J. Dec. 5, 1877, to their order. S. & G. were physicians and in partnership from Dec., 1877, to Dec., 1878, and each was indebted to plaintiff individually, S. for \$30 and G. for \$100, and the note was turned over to secure such debts.

Plaintiffs produced the note on the trial and proved that the endorsement in the firm name was in the handwriting of G. and that the note was due and had not been paid by the maker. No demand of payment was made on the maker, but notice of non-payment was given to one of the payees, who, with knowledge that no demand had been made said "All right, he would pay his proportion." There was some other evidence tending to establish a waiver of demand and a promise to pay the note after knowledge that no demand had been made and there was evidence to the contrary and tending to show that

there was no promise to pay more than an amount equal to the debt of S. to plaintiffs.

The question of fact in respect to the waiver was left to the jury, who found for plaintiffs.

*J. Welling*, for applt.

*William Roe*, for respts.

*Held*, That the verdict must be accepted, as there was a conflict of evidence and it cannot be said that it is against the weight thereof. A waiver may be made by parol and a promise to pay made after knowledge of laches in respect to a demand or notice is good. 71 N. Y., 14; 23 Wend., 379. And a waiver made on the day of the maturity of the note is good. 2 Dan. on Neg. Insts., 122.

G. was called by plaintiffs and testified that he had authority to transfer the note to plaintiffs and that the endorsement by him was with the knowledge and assent of S. On his cross-examination he was asked if he had a conversation with one T. and if he did not ask T. to see S. and get his permission to use the note by turning it out to plaintiffs on their debts, and also whether he had not asked T. "if he supposed S. would consent to the endorsement of it" and he denied having any such conversation.

Thereafter defendant called T. and asked him the following question: "Did Dr. G. come to you and ask you to go and see the doctor here, S., and get permission to use the J. note?" This was objected to and the objection was sustained.

*Held*, Error. The evidence called

for would have contradicted the evidence given by G. and raised a question as to his credibility. It would have proved a statement out of court inconsistent with G.'s evidence and upon a question material to the issue made in respect to the authority of G. to transfer the note to plaintiffs and endorse the same over to them in security of individual debts of the payees. There was some evidence tending to establish the facts stated by G. from other witnesses, but the jury may have given more weight to the testimony of G. without the contradiction proposed than they would had T. been permitted to testify to the request and statement made to him by G.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Hardin, J.; Smith, P. J.*, and *Barker, J.*, concur.

#### PARTITION. LIEN.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Elizabeth Hibbard, *respt.*, v. Morgan A. Dayton et al., *appls.*

Decided March 7, 1884.

A judgment obtained against an executor cannot create a lien upon the real estate of the testator by its own force, even if there is no personal estate out of which to satisfy it.

Where the will of a testator directs the payment of his debts and there is no sufficient personal estate to pay them such payment becomes a charge upon his real estate; and in such a case, a judgment creditor of the executor, who is made a party to a partition suit of real estate belonging to the testator in which such real

estate is sold under a judgment entered therein, is entitled to have his judgment paid out of the proceeds before they are distributed, if, in the proceedings taken in such action, notice of the claim of such judgment creditor has been given to all the heirs at law and an opportunity given them to contest it.

Appeal from an order confirming the report of a referee.

This was an action to partition among the heirs of one C. certain real estate of which C. died seized. The defendant Morgan A. Dayton was one of such heirs, and was also the owner of a judgment against C.'s executor recovered for services rendered the testatrix. Dayton, by his answer, set up these facts, and asked that by the judgment to be rendered in this action his claim should be directed to be paid out of the proceeds of the sale of the premises, if a sale should be decreed, before the distribution of the proceeds among the heirs. Such proceedings were had that the premises were sold and the proceeds deposited in court, and a reference was ordered to determine whether the judgment obtained by Dayton was a lien upon such proceeds superior to the claims of the heirs at law and, therefore, entitled to be first paid. It was proved before the referee that there was no personal estate belonging to testatrix in the hands of her executor out of which Dayton's judgment could be satisfied, and also that by her will she had directed the payment of her debts. The referee held and reported that the judgment was not a lien upon the property or its proceeds, and that Dayton was not

entitled by law to be paid the amount thereof in this action.

*Ira Shafer*, for applt.

*Sackett & Williams*, *A. M. & G. Card*, *C. P. Dorland*, *S. G. Guernsey*, and *Thompson*, *Weeks & Lown*, for various respts.

*Held*, That the judgment was not a lien upon the real estate of the testatrix, nor was such real estate bound, or in any way affected by it. Code Civ. Pro § 1823; 2 R. S., Edmunds Ed., 468, § 12; 45 N. Y., 802.

That the direction in the will of testatrix that her debts should be paid constituted the payment of such debts a charge upon her real estate subject to which the heirs at law must receive their respective portions. 2 Story's Equity Jurisprudence, § 1246. That therefore the defendant Dayton had a lien upon the proceeds of the property, to the extent above suggested, for the payment of his judgment; but that since his answer had been served upon the plaintiff only and therefore the other defendants had received no notice of his claim and had had no opportunity to contest it, it was necessary that he should institute some other proceedings, of such a nature as he might be advised, to enforce it against the proceeds of the real estate, and that in the meantime his lien should be preserved and an opportunity given him to institute such proceedings.

Ordered accordingly.

Opinion by *Brady, J.*; *Davis, P. J.*, concurs.

## MARRIED WOMEN. SERVICES.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

*James Roblee et al., respts., v. Alice L. Gallentine, impld., applt.*

Decided April, 1884.

In the absence of express agreement, services performed by a woman as a member of the family of her father-in-law are impliedly gratuitous, and if they are to be paid for the compensation belongs to her husband. Certain evidence held sufficient to sustain a judgment setting aside a judgment for fraud.

Appeal from judgment on referee's report.

Action by plaintiffs, judgment creditors of Bailey Gallentine, to set aside as fraudulent and void a judgment confessed by said Bailey to defendant Alice, his daughter-in-law, in an action upon a promissory note made by Bailey to Alice. The complaint in this action alleges that the judgment confessed was for a pretended indebtedness for board alleged to have been furnished by Alice to Bailey, but that Bailey was not in fact indebted to her and the judgment was without consideration. Bailey was made a defendant in the present action, but did not answer, thus admitting the allegations in the complaint. Alice answered, alleging that her judgment was obtained upon a note given by Bailey to her in consideration of her services to said Bailey, and for board and washing for a number of years, in pursuance of an agreement between her and Bailey, by which he was to pay her fair compensation

therefor. Alice was married and went to live with her husband in his father's house, in 1875; she was then about twenty years old, and had no separate estate then or since, and she never lived or worked in Bailey's family till after her marriage. Plaintiffs rested after showing those facts, and defendants, although in court, did not take the stand, but rested their case without making any proof.

The referee found that the note was without valuable consideration, and that the judgment was obtained and confessed with intent to hinder, delay or defraud Bailey's creditors.

*Daggett & Norton*, for applt.

*E. C. Olney*, for respts.

*Held*, No error. Appellant's services were impliedly gratuitous, unless it appears that by express agreement they were to be paid for. 3 N. Y., 312. If the services were to be paid for the compensation belonged to appellant's husband, 25 Hun, 239; S. C., 93 N. Y., 17, he not having transferred to her his right thereto, or consented that she might receive the same.

If there was no legal consideration for the judgment, of course both parties to it are chargeable with fraudulent intent. The evidence justified the inference of fraud. 43 Barb., 448.

Defendant's motion for non-suit on the ground that the execution issued on plaintiff's judgment was returned unsatisfied, and there was no proof of an outstanding execution, was rightly denied. 27 N. Y., 244.

Judgment affirmed, with costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## EXECUTORS. TRUSTEES.

### N. Y. COURT OF APPEALS.

*Haight et al., appls., v. Brisbin, exr., respt.*

Decided May 9, 1884.

Where a power of sale is given to an executor to be exercised in his discretion, his judgment if exercised in good faith is conclusive. If he fails to exercise his discretion so as to accomplish the purpose of the will the court may put him in motion or act in his place.

Where it appeared that the executor had made reasonable efforts to sell, but there was no demand for the property and its depreciation in value was due to the condition of the real estate market, *Held*, That a case for the removal of the executor was not made out.

Affirming S. S., 16 W. Dig., 187.

This action was brought to remove defendant as executor and trustee under the will of B. on the ground of neglect of duty in omitting to carry into effect the direction of the testatrix in regard to the conversion of certain real estate. The will empowered the executors to sell and convey all the real estate of which B. died seized for the best price they could get and "at such time or times as shall in their judgment be for the best interest of all concerned," and the proceeds with her personal property B. gave to her executors, in trust, to invest and pay the income to her daughters during their lives and on their deaths to pay the principal to the children of

said daughters. Three executors were named in the will, but defendant alone qualified. The evidence showed that the real estate of which B. died seized had not been sold; that since her death there had been no demand for it; that any depreciation in it since the death of B. was due to the condition of the real estate market, defendant having made all reasonable efforts to sell by advertising and otherwise but without success, and that prior to the trial no person had offered to purchase it.

*E. F. Bullard*, for appls.

*George B. Lawrence*, for resp't.

*Held*, That plaintiffs failed to make out a case against the defendant; that while the direction of the testatrix to sell her real estate is imperative, she leaves the time of sale to be determined by her executors in the exercise of their discretion, and the judgment of the executor if exercised in good faith is conclusive. 1 Story's Eq. Jur. (10th ed.), §§ 169-170 a.; 1 Sand. Ch., 357; 19 W. Dig., 90.

*Dimes v. Scott*, 4 Russell, 195, distinguished.

If the executor fails to exercise his judgment so as to accomplish the purpose of the will the court may put him in motion or act in his place. It will not permit the heirs to suffer from his negligence or misconduct.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Danforth, J.* All concur.

## ASSIGNMENT FOR CREDITORS.

### N. Y. COURT OF APPEALS.

Stanford, assignee, *applt.*, v. Lockwood et al., *resp'ts.*

Decided April 22, 1884.

Defendant's firm made a general assignment for the benefit of creditors to plaintiff, who accepted the trust. Thereafter plaintiff delivered a portion of the assets to defendants on their indemnifying him against the claims of creditors and quit-claiming the balance of the assets to him, but he was never removed or discharged as assignee nor his bond cancelled. After this the government made its draft to defendants' firm in settlement of a claim against it which was a part of the assets of the firm, though not included in its schedule. This draft was received by L., and was deposited by him to his individual credit. *Held*, That the title of plaintiff, as assignee, to the draft was not lost or merged, and as such he was entitled to collect the claim.

At the time of the aforesaid arrangement the administratrix of a former member of the firm executed a general release to plaintiff. *Held*, That she thereby ratified the transfer of the assets to him and freed them from any claim she might have in equity to require their application to the debts of the old firm.

Reversing S. C., 16 W. Dig., 812.

This action was brought by plaintiff, as assignee of L. & Co., to recover the amount of a draft.

It appeared that between January 31, 1871, and August 21, 1872, a claim against the United States Government accrued in favor of the firm of L. & Co., to recover moneys paid under protest, which remained unsettled until October, 1875. About May 1, 1871, V. B. withdrew from the firm and assigned all his interest therein to L. G. L., one of the partners. The latter died February 24, 1872, hav-

ing prior to his death withdrawn from the firm his share of the assets, and being largely indebted to the firm at the time of his death. The surviving members took possession of all the assets of the firm, assumed all its liabilities, and continued the business under the same firm name and paid to the government \$2,527.35, a part of the claim in question. It continued business until April 21, 1873, when it made a general assignment to plaintiff of all its firm property for the benefit of creditors. The assignment was duly executed and acknowledged by each members of the firm, including the defendant L., and was duly filed and recorded. Plaintiff accepted the trust, gave security, assumed control of the estate. He has never accounted, advertised for claims, been removed or discharged, nor has his official bond been cancelled, and plaintiff has since continued to act as assignee. The claim in question was not set forth in the schedules filed, but the assignors knew of its existence and informed plaintiff thereof, and that it was one of the assets covered by the assignment. The whole demand was presented to the government as a single claim. Prior to 1873, the defendants D. & D. constituted a firm of bankers and brokers, and continued in business as such until January 1, 1876. For several years prior to January 1, 1876, defendant L. had kept an individual account with D. & D., and when L. & Co. suspended D. & D. was one of its creditors, knew of its suspension and insolvency, and that plaintiff

was acting as its assignee, and dealt with him as such prior to October, 1875. On December 15, 1874, plaintiff, at the request of L., delivered to him and his brother, one of the members of the firm of L. & Co., a portion of the assigned estate upon their giving a bond of indemnity, conditioned also that with the proceeds they should satisfy all the remaining creditors of L. & Co., pursuant to the deed of assignment. At the same time, A. L. L., the sole executrix and sole representative of L. G. L., as his executrix, executed a general release to plaintiff as assignee. Plaintiff, as a creditor, released his debt against the assignors, and they in consideration thereof, assigned and quit-claimed to plaintiff, individually, all the surplus or residue of the estate assigned to him in trust, except certain corporate stock and promissory notes which were still held by him as assignee. To induce plaintiff to do this, defendant L. represented to him the existence of claims which he, as assignee, would be able thereafter to collect. The individual creditors of the respective partners were not provided for, except by the original deed of assignment. About October 19, 1875, the government made its draft to the order of L. & Co. for \$11,696.32 in settlement of the claim in question. This draft was received by L. about that date, and he indorsed it with the name of L. & Co., and delivered it to defendants D. & D., who knew that the draft constituted one of the assets of L. & Co.. D. & D. then indorsed it,

and having collected it credited it to L. individually. This was done without plaintiff's consent.

*L. A. Gould*, for applt.

*L. L. Van Allen*, for respts.

*Held*, That the title of plaintiff, as assignee, to the draft in suit was not lost or merged, and as such he was entitled to collect this claim. 71 N. Y., 502; 93 id., 380. The fact that in the end such collection, through the proper and lawful settlement of the trust, might enure mainly or even wholly to his personal benefit does not weaken or destroy his title as trustee.

The new firm, having legal title to the assets, could transfer them. 3 Paige, 525; 88 N. Y., 600; 13 Otto, 613; 43 Barb., 513. If the executrix of L. G. L. had any equity to require their application to debts of the old firm as distinguished from those of the new, she released the assignee from all such claims by the general release, and so ratified the transfer to the assignee and freed the assets in his hands from any such claim.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

Opinion by *Finch, J.* All concur.

## CONVERSION. PRACTICE.

### N. Y. COURT OF APPEALS.

*Burnap, respt., v. The National Bk. of Potsdam, applt.*

Decided May 9, 1884.

B., plaintiff's husband, on procuring the discount by defendant of the note of one D., deposited a bond owned by plaintiff as col-

lateral. At the maturity of said note D. made a new note with which he renewed the former one without the knowledge of plaintiff. The second note not having been paid defendant without notice to B. or plaintiff sold said bond and applied the proceeds on the note. *Held*, That defendant was liable for a conversion of the bond; that before retaining it on a new contract it should have required B.'s consent.

Evidence as to facts not found by a referee and as to which no finding was requested cannot be considered for the purpose of reversing the judgment.

This action was brought to recover for the alleged conversion of a U. S. bond for \$500, with the coupons attached. It appeared that on Nov. 2, 1876, D. made a promissory note whereby for value received he promised to pay \$500 to his own order ninety days from date at the National Bank of Potsdam. D. indorsed the note and transferred and delivered it to B. for a valuable consideration. On B.'s application and a \$500 U. S. bond which he deposited as security the bank discounted the note and B. received the proceeds. On Feb. 21, 1877, D., without the knowledge or consent of B., made a new note whereby he promised to pay to his own order at said bank \$500 three months after date, adding the words "U. S. bond \$500 collateral security." D. indorsed and delivered this note to defendant, paid the interest thereon in advance, and defendant in consideration thereof canceled the first note and surrendered it to D. The U. S. bond referred to was the same one left by B. as collateral to the first note. Before the second note matured D. absconded,



his note was not paid and defendant, without demand of payment of B. and without notice to him, sold the bond and coupons in open market and of the proceeds appropriated the amount of the note and expenses of sale, leaving a balance of \$55.68. The bond in fact belonged to plaintiff, the wife of B., who consented to his pledging it as security for the payment of the first note. She knew nothing about the second note, and, after demand, brought this suit for the conversion of the bond by defendant. D. swore that before the first note matured he asked B. if he might renew it and B. consented and his evidence tended to show that B. also assented to the bond remaining as security for the renewal note in defendant's hands. D. was contradicted in this by B. and his character for truth and veracity impeached by five of his neighbors. It clearly appeared that neither plaintiff nor B. did anything to lead defendant to suppose they would assent to a continued pledge of the bond.

*Parker & McIntyre*, for applt.

*John A. Vance*, for respt.

*Held*, That plaintiff was entitled to recover; that the Bank before retaining the bond on a new contract should have required B.'s consent, and having chosen to rely on the assurance of D. must suffer for his deceit.

Evidence in relation to facts not found by the referee, and as to which no finding was requested, cannot be considered for the purpose of reversing the judgment. 82 N. Y., 1.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Danforth, J.* All concur.

## CHARTER PARTY. DAMAGES.

N. Y. COURT OF APPEALS.

*Johnson et al., respts., v. Meeker, exrx., et al., applts.*

Decided May 9, 1884.

Defendants chartered a barge, properly manned, of plaintiffs, for a certain period, but after using it for three months abandoned it and left it lying exposed to the weather. *Held*, That plaintiffs had a right to resume possession of and use the barge, and to recover the difference between the amount agreed to be paid and the net earnings of the barge during the balance of the period. A former recovery for the use by defendants of the vessel is no bar to an action to recover damages for a breach of the contract by a subsequent neglect to use it.

This action was brought upon a contract, partly in writing, for the charter of a barge. It appeared that plaintiffs were to furnish a barge, properly supplied with captain and crew, for the transportation of coal between Hoboken and Fall River, from March, 1876, to January 1, 1877, at \$300 per month for two trips a month. After using the barge for three or four months, defendants abandoned it and left it lying at the dock in Hoboken, where it remained about three months exposed to the weather, its sides being dried and out of water about ten feet. Plaintiffs took possession of and used the barge, and claim to recover the

difference between the amount agreed to be paid by defendants and the net earnings.

*Walter Edwards*, for applts.

*Joseph A. Shoudy*, for respts.

*Held*, That plaintiffs were entitled to recover; that they had a right to resume full possession of and use the barge, so as to relieve defendants from damages arising from their neglect, and they also had the right to protect the barge and prevent it from being ruined from exposure and disuse. Plaintiffs merely acted in the line of their duty in seeking to reduce the amount of damages sustained by defendants by using the barge. 61 N. Y., 362; 43 id., 231; 28 id., 72; 1 Den., 317.

*Also held*, That this case differs from an ordinary bailment; the possession of defendants not being absolute and exclusive, the officers and crew of the barge being employed and paid by the plaintiffs, and only to a limited extent the servants of defendants, plaintiffs retained a right to the possession of the vessel, and defendants had only the right to direct the officers and crew as to the manner in which they should be employed, and when they ceased to do this plaintiffs committed no trespass in directing the use of the vessel for the benefit of the parties interested.

A recovery was had in a former action for six months use of the barge, which was due at the time. In this action it is sought to recover damages for a breach of the contract arising from defendant's neglect to use the barge.

*Held*, That the former recovery was no bar to the present action.

Judgment of General Term, setting aside verdict ordered for defendant and granting new trial, affirmed.

Opinion by *Miller, J.* All concur, except *Finch, J.*, absent.

### FRAUD.

N. Y. COURT OF APPEALS.

*Morris et al., respts., v. Talcott, applt.*

Decided May 9, 1884.

An intent to defraud cannot be imputed to one who contracts a debt knowing that he is insolvent merely from the fact of his insolvency and his omission on a purchase upon credit to disclose such condition to his vendor, but the necessary facts must be made out by competent evidence.

Representations made by a party with a view of procuring credit, to affect subsequent credits extended by the vendor, must be made in the course of the dealing and under circumstances from which it may be inferred that they were made with an intent to induce a continued credit.

Reversing S. C., 16 W. Dig., 237.

Plaintiffs sued defendant to recover for goods sold and delivered under alleged fraudulent representations. Upon the complaint and affidavits an order of arrest against defendant was obtained for fraud. The only evidence to support the charge of fraud was that defendant, in April, 1882, upon being requested by plaintiffs to give them an indorser upon a note for the balance of an existing account refused to do so, saying that he was "perfectly good and solvent without an indorser." The only evidence to rebut this was

proof of defendant's failure in business nine months afterwards, the circumstances of which failure were not proved. There was no proof of further dealings between plaintiffs and defendant until September, 1882, when he again commenced to buy goods of them. Defendant admitted that as early as October, 1882, on examining his books, he discovered he was insolvent and owed \$2,200 more than his assets, besides an indebtedness of \$13,000 to his father, which had existed for a number of years. In December, 1882, defendant made a general assignment to his father and brothers of all his property for the benefit of his creditors. It was not alleged that there were any fictitious debts in the assignment or any property fraudulently withheld from the inventories. There was no proof given of the nature, extent or character of plaintiff's business or the amount or value of his assets. The time when the indebtedness to plaintiffs accrued, except that it was after September 5 and prior to December, 1882, did not appear.

*Benj. W. Downing*, for applt.

*Charles W. Dayton*, for respts.

*Held*, That the order of arrest should not have been granted, as upon the evidence an intention on the part of defendant not to pay for the goods cannot be legally imputed to him; that the fraud charged against him being in the nature of a crime could not be presumed, but must be established by evidence. 8 Barb., 592; 3 Johns., 281; 4 Cow., 207. An intent to defraud cannot be imputed to

a party who contracts a debt knowing that he is insolvent, merely from the fact of his insolvency and his omission, upon a purchase of property upon credit, to disclose such condition to his vendor. 18 N. Y., 295; 23 id., 264; 67 id., 9; 81 id., 108. The necessary facts must be made out by competent evidence.

Defendant was entitled in the judicial consideration of the proofs to the application of the rule that the presumptions of the law are in favor of the innocence of the person accused.

While representations made by a party with a view of procuring credit with another may be held to apply to and affect subsequent credits extended by the vendor to the vendee, yet such representations in order to have that effect must be made in the course of the dealing and under circumstances from which it may be inferred that they were made with an intent to induce a continued credit. 75 N. Y., 61.

An order denying a motion to vacate an order of arrest obtained upon the theory of a fraudulent contraction of a debt is not reviewable in this court when the facts and circumstances proved, or the legitimate inference deducible from such facts, furnish some evidence tending to establish the existence of a fraudulent intent on the part of the defendant in the creation of the debt. 67 N. Y., 1. But when there is no evidence tending legitimately to establish such a conclusion, and the natural inferences to be drawn from the

facts stated do not necessarily lead to the presumption of a fraudulent intent, a question of law is presented which calls for the judgment of this court.

Order of General Term, affirming order of Special Term denying motion, reversed and motion granted.

Opinion by *Ruger, Ch. J.* All concur.

## WILLS.

### N. Y. COURT OF APPEALS.

*Freeman, exr., applt., v. Coit, impld., respt.*

Decided May 6, 1884.

An absolute interest given in one clause of a will cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or by clear and undoubted implication.

Testatrix devised two-thirds of her estate to her children and one-third to her husband and mother equally. The will then provided that if all the children die before the age of twenty-one the husband shall have \$20,000 in full of all right or claim to the estate under the will, and the mother the residue. *Held*, That there was a present and absolute gift to the husband and mother of one-third of the estate, which was not cut down by the subsequent provision.

Affirming S. C., 15 W. Dig., 142.

This appeal involves the construction of the will of F., plaintiff's testatrix. F., by the first clause of the second section of her will, creates a trust estate as to two-thirds of her estate during the minority of her children for their benefit with the remainder in fee to the children on their arriving at the age of twenty one.

Vol. 19—No. 7b.

Then follows a devise of the other third to her husband and mother to be equally divided between them. She then provides that, if her children all die before attaining the age of twenty-one, her husband shall have \$20,000 in full of all right or claim to her estate under the will and the residue of the estate is bequeathed by F. to her mother.

*Charles M. Hall*, for applt.

*F. E. Dana*, for respt.

*William W. Northrop*, Special Guardian.

*Held*, That there was a present and absolute gift to the husband and mother of the testatrix, as tenants in common, of one-third of the estate, which was not made contingent by the subsequent provisions of the will.

An interest given in one clause of a will, in terms denoting an absolute estate, may, by force of a subsequent clause be qualified by a limitation over in a certain event, or be cut down, or made to take effect only on a contingency, 53 N. Y., 233; yet it cannot be cut down or taken away by raising a doubt from other clauses but only by express words, or by clear and undoubted implication. 2 Cl. & Fin., 22; 81 N. Y., 356.

Judgment of General Term, affirming as modified decree of Surrogate, affirmed.

Opinion by *Andrews, J.* All concur.

## FORECLOSURE. LIMITATION.

## N. Y. COURT OF APPEALS.

Howell et al., *respts.*, v. Leavitt et al., *exrs.*, *appls.*

Decided April 29, 1884.

In an action of foreclosure the summons was served by publication on H., to whom the premises had been conveyed by the mortgagor. H. was, in fact, dead at the time of such service, but his death was unknown to the plaintiff, who purchased on the sale and was put in possession by a writ of assistance. In an action of ejectment by H.'s heirs, *Held*, That the judgment of foreclosure was a nullity as to them, and their dis-possession unlawful.

The exception in § 375, Code Civ. Pro., puts restraint only upon the extension of time, and means that the disability shall not add more than ten years to the time limited after the disability has ended.

This was an action of ejectment. In February, 1856, one R. became owner of the premises in dispute, subject to a purchase money mortgage of \$5,500, executed by him to one L. A few months after R. conveyed to one T., subject to said \$5,500 mortgage, T. giving to R. a mortgage of \$1,800. Later in the same year T. conveyed to H., subject to the \$5,500 mortgage, but no reference was made to the \$1,800 mortgage. On September 18, 1857, R. brought an action to foreclose the \$1,800 mortgage, making T. and H. and wife defendants. Mrs. H. was served with summons in said action November 17, 1857. H. died in October, 1857, his death being, for some time after, unknown. On an affidavit that H. could not be found and that the affiant was informed he was in Chicago, an order for service by publication on him was made Novem-

ber 19, 1857, and a judgment of foreclosure was finally rendered. The property was sold to R., the mortgagee, who, by a writ of assistance, put T. out of possession. H. left him surviving his widow and four minor children—the plaintiffs here. After R. had obtained possession he paid off the \$5,500 mortgage and then sold the property. This action is brought against his grantees.

*D. P. Barnard*, for *appls.*

*W. J. Gaynor*, for *respts.*

*Held*, That the judgment of foreclosure was, as to the plaintiffs here, a nullity; that the dispossession of plaintiffs was unlawful, and the possession acquired by R. could not be pleaded as a defense to this action because he was a mortgagee.

It appeared that L. H., one of the plaintiffs, became of age December 31, 1864. R. got possession, claiming title as owner, March 15, 1858. This action was commenced November 8, 1878.

*Held*, That the rights of L. H. were not barred by the statute of limitation. 16 Hun, 174; 81 N. Y., 173. The exception in § 375 of the Code of Civil Procedure relates to the extension of the time limited, and puts restraint only upon that extension. It means that the disability shall not add more than ten years to the time limited after the disability has ended.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Finch, J.* All concur, except *Ruger, Ch. J.*, not voting.

## EXECUTORS.

## N. Y. COURT OF APPEALS.

Snyder, *applt.*, v. Snyder et al.,  
exrs., *respts.*

Decided May 6, 1884.

Defendant's testator boarded with and was taken care of by plaintiff and her husband and agreed to compensate them for such service. The husband, who is one of the executors, assigned his interest in the claim for services to plaintiff. The co-executor having refused to allow or refer the claim, this action was brought thereon. *Held*, That plaintiff being the real party in interest was entitled to recover, and could not be defeated because her husband would have been disqualified from suing by reason of his position as executor.

Reversing S. C., 16 W. Dig., 395.

This action was brought to recover for the board and care of S., defendant's testator, from August 6, 1874, to December 5, 1878, and for dry goods, clothing and liquors furnished by plaintiff and her husband, the defendant P. S., to S., at his request, in the years 1876, 7 and 8. Plaintiff alleged an assignment by her husband of all his interest in the claim to B., who assigned it to her. S. died December 4, 1878. His will having been proved and defendants having qualified as his executors, plaintiff presented her claim to them and demanded that it be allowed or referred. Defendant S. S. refused to allow or refer the claim, alleging that it had been paid, and that it was a part of a conspiracy between plaintiff and his co-executor to defraud the estate.

The referee found that plaintiff was the wife of defendant P. S. during the time the services alleged

in the complaint were rendered; that she then had no separate estate, business or trade; that for several years before his death the testator required a great deal of care; that he lived at the house of P. S., and had boarded with him for many years prior to August 7, 1874, at an agreed price, which he paid. On January 17, 1874, S. executed an instrument, by which, for value received, he released P. S. from all liability for the use of his household furniture or the loss or destruction thereof, and agreed to pay P. S. for the services of himself and family in taking care of him. From August 7, 1874, to December 4, 1878, P. S. had the use of that part of the farm owned by S., free of charge. On several occasions since 1874 the testator promised to pay plaintiff for his board, when in usual health, four dollars per week, and when sick from one to seven dollars per day. The referee found that plaintiff, being the wife of P. S., could not recover, and that P. S., being executor, could only collect or be allowed his claim by proceedings under the statute providing for such a case, and that plaintiff, as his assignee, could have no other right.

*S. D. Halliday*, for *applt.*

*Merritt King*, for *respt.*

*Held*, Error; that plaintiff being the real party in interest, has the legal as well as the equitable right of her assignor, whose presence as party plaintiff is unnecessary; that plaintiff, being personally qualified to sue, cannot be defeated because the person under

whom she claimed would, if he had sued as plaintiff, have been disqualified by reason of his relation to the parties named as defendants.

Judgment of General Term, affirming judgment dismissing complaint, reversed.

Opinion by *Danforth, J.* All concur, except *Finch, J.*, not voting.

### ANIMALS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jesse Barto et al., *respts.*, v. John G. Stephan, *applt.*

Decided April, 1884.

Evidence that plaintiffs' crops were damaged by cattle and that defendant had admitted that the cattle were his is sufficient to support a judgment against defendant for such damages.

The owner of domestic animals is bound to keep them on his own premises, under peril of the damage they may do to the property of others.

Appeal from judgment of County Court, affirming justice's judgment.

Both parties appeared before the justice on the return day of the summons, and plaintiffs complained that defendant's cattle had broken plaintiffs' close and destroyed their corn and other crops thereon growing, to plaintiffs' damage \$25, for which sum and costs plaintiffs claimed judgment. Defendant refused to answer the complaint and immediately left the court, and plaintiffs produced their testimony, and the justice rendered judgment in their favor of \$15

damages and costs, in defendant's absence. Plaintiffs proved that they occupied some 12 acres, upon which they raised a crop of corn and other vegetables, and that 14 or 15 head of cattle were seen on the lot, and that they destroyed a quantity of corn, the extent and value of which were described by the witnesses. One of the plaintiffs testified that he had a talk with defendant the next day concerning "the 14 or 15 head of cattle." "He said they were his." No other cattle were shown to have been on the lot.

*Joel L. Walker*, for applt.

*Calkins & Emery*, for respts.

*Held*, That the evidence is sufficient to support the judgment. The question of the identity of the cattle was for the justice upon all the evidence. The testimony that the boy who came and got the cows said he worked for defendant was incompetent to show defendant's ownership, but as that fact was established by other and competent evidence the reception of that item of testimony did not prejudice defendant.

In general, every owner of domestic animals is bound to keep them on his own lands, under peril of the damage they may do to the property of other persons. 1 Cow., 78. If any fact existed which relieved defendant from that obligation he should have shown it.

Judgment affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## EXCISE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Henry E. Ripley et al., over-  
seers, *appls.*, v. John Little,  
*respt.*

Decided April, 1884.

Evidence that liquors were sold in a building owned by defendant is insufficient to establish a cause of action for violation of the excise law where it appears that the store in the building was carried on by defendant's son, who sold the liquor, and it does not appear that defendant had any interest in the store or that the son acted as his agent.

Appeal from County Court judgment, reversing justice's judgment.

Action to recover penalties for selling intoxicating liquors without a license.

Defendant called no witnesses. Plaintiffs introduced testimony tending to show that on several occasions within the year preceding the trial intoxicating drinks were sold in a building owned by defendant, in which the business of selling groceries and drugs was carried on, but on cross-examination of defendant's son Henry, he testified that for two years preceding the trial he was sole owner of the goods and the business, and that defendant had no interest in them at that time. The sales were made by Henry, and there was no proof that he acted as his father's agent, or with his knowledge or consent.

*J. W. Dunwell*, for *appls.*

*C. McLouth*, for *respt.*

*Held*, That the evidence fails to establish a cause of action against defendant.

The facts that the store was spoken of by some of the witnesses as John Little's store, that the government license which Henry had was in his father's name, and that it was paid for out of the store, were explained by Henry's testimony that his father preceded him in the business, and that the license was taken out several years before the sales in question were made, when his father conducted the business. Henry's testimony is not contradicted, and plaintiffs cannot claim that their own witness should be discredited.

Certain admissions were proved to have been made by defendant, but they seem to have been made before Henry became proprietor of the store.

Judgment of County Court affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## ATTACHMENT. DAMAGES.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Frank Watts, *applt.*, v. M. S. Nichols et al., *respts.*

Decided April, 1884.

Where an affidavit for attachment stated that defendants, commission merchants, sold plaintiffs' property contrary to instructions, but made no averment that the market value at the time of sale exceeded the price at which the property was sold, or that it afterward rose above that price, *Held*, That no right is shown to more than nominal damages, and that property cannot be attached upon a claim for nominal damages only.

Objections to the entitling of motion papers cannot be taken for the first time on appeal.



One defendant copartner may move to vacate an attachment against partnership property.

Appeal from order of Special Term, vacating a warrant of attachment on motion of defendant, George E. Nichols.

The attachment was granted upon plaintiff's affidavit, stating the grounds of his claim as follows: that defendants were copartners and commission merchants, and that they purchased for plaintiff, at a certain commission, a quantity of pork and lard; defendants were to sell the same, if requested by plaintiff, at any time during the year, and not otherwise; within the year, defendants, without plaintiff's knowledge or request, sold the property for \$2,150 less than it cost, and reported to plaintiff that it had been sold and delivered to other parties.

*W. A. Nims*, for applt.

*O'Brien & Emerson*, for respts.

*Held*, That the facts stated in the affidavit do not show a right to recover more than nominal damages. 81 N. Y., 25.

*Baker v. Drake*, 53 N. Y., 211; *Taussig v. Hart*, 58 id., 425; *Colt v. Owens*, 90 id., 371, distinguished.

A bare statement of the amount of the claim is not enough. The facts must be set forth showing the right to recover. 27 Hun, 242; 29 id., 306.

Even if a claim for nominal damages had been made in the affidavit, it would not have justified the issuing of an attachment. It is not the intent of the statute

to allow the property of a defendant to be attached upon a claim for nominal damages only.

The objections that the particulars in which the attachment papers are claimed to be defective should have been specified in the moving papers, and that the moving papers should have been entitled, as to defendant, "George E. Nichols, impleaded, &c.," are not tenable. The defects on which the motion is founded relate to the merits and are not mere irregularities; and as the notice of motion or order to show cause is not printed in the appeal book, we cannot say it was not properly entitled. Besides, the objection to the entitling was waived in not being taken below.

One of several defendants may move to vacate an attachment, Code, § 682, 688, 689, to the extent of his interest in the property. 85 N. Y., 500. As the moving party is interested in the entire partnership property, he seems to be entitled to a complete *vacatur* of the attachment.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## BANKS. FRAUD. COUNTER-CLAIM.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The City National Bank of Dallas, *respt.*, v. The National Park Bank, *applt.*

Decided March 7, 1884.

Where a president of a national bank is allowed to usurp the functions of the board of directors and virtually to become and be the bank as representing all its corporate functions and to use the bank for his own private business and purposes until he becomes largely indebted to it and then, with the knowledge of the bank, starts out to obtain money with which to pay such indebtedness, the bank is chargeable with notice of any fraud which he may commit in obtaining money which the bank receives in such payment.

The implied contract to repay money obtained by fraud consummated by means of a conspiracy is joint and several between the conspirators, and an action on such implied contract may be brought against one conspirator to recover the whole amount so obtained, and, in a proper case, such liability of one conspirator on such implied contract may be asserted as a counterclaim against him in an action brought by him against the injured party.

Appeal from a judgment entered upon a verdict of a jury.

This action was brought to recover a balance of account at defendant's bank, amounting to about \$26,000. Defendant admitted the allegations of the complaint, but set up as a counterclaim that plaintiff and one Hardie had entered into a conspiracy together, in pursuance of which said Hardie had obtained from defendants by fraud and false representations about \$25,500, and that the said Hardee had defrauded defendants out of \$25,500, and that plaintiff, with knowledge that the money was the proceeds of such fraud, received from him \$10,338.33 in payment of his indebtedness to it.

It appeared that Hardie had been the president of plaintiff since its organization in 1880; that during the absence of the vice-president to

Europe, Hardie had had charge of its business, and had been allowed to manage it almost wholly for his own business and purposes, until he had loaded it down with his own liabilities in a sum of about \$80,000. That, after the return of the vice-president, the condition of the bank was discussed between him and Hardie, and it became evident that Hardie could not pay his indebtedness to the bank. That thereafter Hardie set out for N. Y. for the purpose of borrowing money, it being obviously the understanding that the money he would borrow, in part if not wholly, was to be applied on his indebtedness to plaintiff. While in N. Y. for this above mentioned purpose Hardie obtained a large sum of money from defendant by fraud and false representations, a portion of which was received by plaintiff in payment of his indebtedness to it. During all this time he remained president of plaintiff and was not removed from that position until some time after his return on the discovery that he had indorsed his individual note with plaintiff's name without authority, and defendant claimed that plaintiff had conspired with him to keep him in that position in order that he might the more readily defraud defendant. The court refused to charge that plaintiff was chargeable with constructive notice of Hardie's fraud because of his official relation to it, and submitted to the jury only the question of actual notice. It was also insisted that, since defendant waived the tort of plaintiff in en-

tering into the alleged conspiracy, and brought this action to recover upon the implied contract to repay the money obtained by the fraud, such an action was upon a joint contract, and that, inasmuch as Hardie was not a party to the action, the implied contract could not be set up as a counterclaim, and the court so held.

*Francis C. Barlow*, for applt.

*Moore, Low & Sanford*, for resp't.

*Held*, That when a president of a national bank, who has been allowed to usurp the functions of the board of directors and has been permitted to become and be the bank, and to manage it for his own business and purposes, starts out for a raid upon the financial credibility of other banks and capitalists for the purpose of capturing funds with which to relieve himself and his bank from the embarrassment in which he has plunged it, his knowledge of any fraud he commits in obtaining the money should be charged as notice to his bank when it becomes the recipient of the plunder.

That the mere abstract question whether the knowledge of the president of a bank of his private personal dealings when through them he brings a benefit to the bank is notice to the bank is not controlling in such a case as this. 34 N. Y., 30; 4 Paige, 127; 2 Hill, 457; 72 N. Y., 286; 10 Gray, 532.

That the implied contract to repay money obtained by fraud consummated by means of a conspiracy which arises on waiver of

the action for tort is joint and several and not joint alone, and each party to the conspiracy can be sued separately upon it and made to answer for the whole amount; and that when either conspirator brings an action against the injured party upon contract, his liability on such implied contract may be asserted against him as a counterclaim.

Judgment reversed and new trial granted.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

### MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Hiram G. Miller, resp't.*, v. *Ephraim N. Hart, applt.*

Decided May, 1884.

Defendant executed to plaintiff a mortgage upon a flouring mill "with appendages of every description now used in and about the same, consisting of all dams, water-courses, &c." *Held*, That under the word "appendages" title passed to a platform scale, a corn-sheller, &c., which were in the mill when the mortgage was executed.

Defendant executed a mortgage to plaintiff upon a flouring mill "with appendages of every description now used in and about the same, consisting of all dams, water courses, waste weirs, lands flowed, and so forth." When the mortgage was executed there were certain articles in the mill, a platform scale, some scoops, mill picks and a hand corn-sheller. The question in the case was to whom these latter articles belonged. Plaintiff succeeded below.

*Vandemark & Lawrence*, for applt.

*I. C. Ormsby*, for respt.

*Held*, That the articles passed to plaintiff under the words "all appendages used in and about said mill." There is a difficulty, it is true, in construing the next clause, "consisting of all dams, &c." But these dams, &c., are not accurately "appendages," so that some special meaning must be given to the word appendages. It seems to have been used to indicate articles used about the mill, but not attached to or forming part of it.

Judgment affirmed, with costs.

Mem. by *Learned, P.J.*; *Boardman* and *Bockes, JJ.*, concur.

## NEGOTIABLE PAPER. SURETYSHIP.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Samuel D. Coykendall*, applt.,  
v. *Abram Constable et al.*, respts.

Decided May, 1884.

P., the owner of a note in respect to which defendants, although makers, were in fact sureties, gave the same to an attorney for collection, the note being past due. The attorney gave it to a bank, also for collection, which sent the note to a correspondent bank endorsed for collection. Plaintiff, at the request of one of the makers and the principal debtor upon the note, paid the same to the latter bank, but not at the request of any of the sureties and without the consent of two of them. The bank remitted the proceeds to P. In an action upon the note, which had come to plaintiff from the correspondent bank as a voucher for the payment, *Held*, That plaintiff could not recover; that as to the sureties the note

was paid and plaintiff's only remedy was against the principal debtor.

One Peters lent DeGarmo \$1,000 and took his note therefor, payable to bearer one day after date. Defendants signed the note as makers, but were in fact sureties. About a year afterwards Peters gave the note to his attorney for collection and DeGarmo then said he would pay it if it were sent to the First National Bank of Rondout. The attorney took the note to the Home National Bank of Ellenville to have it sent to the Rondout Bank for collection. This was done and the note was sent to said bank endorsed for collection for account of Home National Bank. About this time DeGarmo told plaintiff of the note and asked him to advance the money. Plaintiff suggested that DeGarmo had better see the sureties and see whether they were willing the note should be transferred to plaintiff. DeGarmo said he had seen one of the sureties (defendants) and that he did not object. Plaintiff then went to the Rondout Bank and directed the note to be charged to his account. This was done, the Ellenville Bank received the amount of the note and paid it to Peters. Peters did not know whose money paid the note. Plaintiff now sues upon the note, which was returned to him with his checks as a voucher by the Rondout Bank after payment by it. None of the sureties requested plaintiff to pay the note, and two (out of three) did not consent to its transfer to him. Defendants claim that plaintiff is

not the owner of the note and that it has been paid to Peters. Defendants had judgment.

*Lawton & Stebbins*, for applt.

*John Lyon*, for respts.

*Held*, That plaintiff could not recover. 21 Barb., 262. Peters never sold or authorized any one to sell the note, and if his agent without authority sold it, Peters did not ratify the act by receiving the money; for he accepted that without knowledge of any sale. The note was past due and the endorsement notified plaintiff that the note was with the Rondout Bank only for collection. Plaintiff did not receive the note as by a purchase, but as a paid check. He did not pay at the request of the sureties but at the request of the principal debtor, and payment by DeGarmo or by plaintiff for him discharged the sureties.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs; *Bockes, J.*, dissents.

#### FORECLOSURE. PARTIES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Margaret Van Schaack, *applt.*,  
v. James Sanders, *implyd.*, *respt.*

Decided May, 1884.

In a foreclosure by advertisement and sale under the statute if a mortgagor leave a will naming executors they must be served with notice of sale although they have never qualified.

*It seems*, however, that such a foreclosure may proceed without such service where no personal representatives of a mortgagor have been appointed and where none are named in his will, if any.

The action was for partition. The defendant Sanders answered setting up title in himself as purchaser on a sale under a foreclosure by advertisement. The court below found in his favor. It appeared that in 1875 one Stephen Post and his wife Abigail owned the property and mortgaged it to one Case. Both the Posts died in 1879; no personal representatives of either of them were served by Case when, in 1880, he foreclosed his mortgage by advertisement. Sanders bought on the sale. The heirs at law of the Posts were served. It appeared that Stephen Post left a will which was admitted to probate, but the executors named therein did not qualify and no letters of administration with the will annexed were ever issued, nor were any letters ever issued on Abigail Post's estate.

*N. A. Calkins*, for applt.

*Raymond & Jones*, for respt.

*Held*, That the foreclosure was irregular. The executors of Post, although they had not qualified, were entitled to notice. It cannot be said that they were, for that reason, not his personal representatives. The authority of the executors comes from the will and they may do many things before letters are issued. 1 Williams on Exrs., 293, 303; 60 N. Y., 349.

We do not hold that where there are no personal representatives named in the will or appointed otherwise there can be no statutory foreclosure; for the contrary seems to be the law. 34 Barb., 319; 11 id., 101; 20 id., 19. But where such

representatives are named in a will I think they should have notice.

Judgment reversed.

Opinion by *Learned, P. J.*; *Bockes, J.*, concurs in opinion that the personal representatives must have notice. *Boardman, J.*, dissents.

## MARRIED WOMEN. MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

James McLaren, *applt.*, v. Emeline A. Percival et al., *respts.*

Decided May, 1884.

The firm of Percival, Wilson & Co. was indebted to the firm of McLaren & Co. Defendant, a married woman, executed a mortgage, at request of her husband, who was a member of the former firm, upon her separate estate, not knowing the purpose of the mortgage or to whom it was payable. In consideration of the same McLaren & Co. extended the time of payment to Percival, Wilson & Co. *Held*, That the mortgage could be enforced against her separate estate.

On December 27, 1878, the defendant, Daniel G. Percival, executed a bond to plaintiff, and on the same day he and his wife, the defendant Emeline, executed a mortgage on her separate property as collateral to said bond. Daniel was then a member of Percival, Wilson & Co., which firm was indebted to James McLaren & Co. (of this latter firm plaintiff was a member) on certain notes. The next day this bond and mortgage were delivered to McLaren & Co. as collateral to said notes. Emeline did not know the purpose for

which she executed the mortgage, and received nothing for such execution. This action is to foreclose said mortgage, and Emeline defends. The referee found in her favor.

*J. Sandford Potter*, for applt.

*James Spencer*, for respts.

*Held*, That the mortgage was not void for want of consideration. A seal is presumptive evidence of consideration, and the burden is on defendant to show that there was none. A good consideration passed from McLaren. It appeared that before October 16, 1878, Percival, Wilson & Co. were indebted to McLaren & Co. in \$66,291.55; that at the time of the execution of the mortgage the latter firm accepted from the former fifteen notes covering said indebtedness, payable in from two to thirty-two months. The mortgage was collateral to these notes. The mortgage and the notes, though differently dated, were evidently meant to be one transaction. This extension of time was a consideration. 85 N. Y., 226.

There was no diversion of the mortgage. Mrs. Percival did not know for what purpose she executed it, nor for whose benefit. She relied on her husband's statement that it was all right. Besides, the mortgage was, on its face, payable to McLaren, as she could have seen by reading it, and delivery of it to McLaren could not be a diversion of it from the purpose for which it was intended.

Judgment reversed, new trial granted, referee discharged, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

### MUNICIPAL CORPORATIONS. COSTS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

John N. Dressel, *respt.*, v. The City of Kingston, *applt.*

Decided May, 1884.

Where the charter of defendant, Ch. 150, Laws of 1872, provided for the appointment of a treasurer, and the latter made affidavit that he was the chief fiscal officer of the city and that the claim in suit had never been presented to him, *Held*, Under Code, § 3245, that plaintiff was not entitled to costs, although he had presented his claim before action to the Mayor and Common Council, who had, by said charter, authority to adjust the same.

Appeal from order directing clerk to tax costs.

The action was for injuries sustained from a defect in a public street. Plaintiff succeeded on the trial. Before the commencement of the action plaintiff presented the claim to the Mayor and Common Council of defendant, who rejected it. By the charter of defendant, Ch. 150, Laws of 1872, provision is made for the appointment of a treasurer. This latter officer made affidavit on the motion that he was the chief fiscal officer of defendant, and was its treasurer; that the claim had never been presented to him. This affidavit was not disputed by plaintiff.

*John J. Linson*, for *applt.*  
*E. S. Wood*, for *respt.*

*Held*, That under Code Civ. Pro., § 3245, no costs could be given. It is not necessary that the officer should be denominated "chief fiscal officer." Those words are descriptive, and in this case they describe the Treasurer of Kingston. It is of no consequence that the treasurer has not, by the charter, authority to adjust the claim. 85 N. Y., 523.

Order reversed, with \$10 costs, and motion denied, with \$10 costs.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs; *Bockes, J.*, dissents.

### MARRIED WOMEN. EXEMPTION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Abel A. Crosby, *applt.*, v. Sarah Stephan, *impld.*, *respt.*

Decided May, 1884.

The proceeds of an insurance policy upon the life of her husband, which have been actually received by the wife upon his death, and deposited in bank, are liable for debts which she has theretofore contracted in carrying on a separate business.

Appeal from an order denying application to punish defendant Stephan for contempt. In 1871 judgment was recovered by plaintiff against said defendant, then a married woman, carrying on a separate business. Execution was issued and returned unsatisfied. In 1883, Charles Stephan, husband of defendant, procured an insurance policy upon his life, payable to defendant. He soon after died. The money due upon said policy

was collected by defendant and deposited in a savings bank. Supplementary proceedings were taken and the usual injunction order granted and served on her. After service defendant drew said money from said bank and now retains it. The court below refused to punish defendant on the ground that the insurance moneys were exempt property.

*Preston & Chipp*, for applt.

*A. T. Clearwater*, for resp't.

*Held*, Error. The husband is dead and the moneys are the absolute property of the widow. The cases cited by the respondent will all be found to relate to cases where the husband's creditors sought to reach such moneys, or where the husband had not yet died. In this case the debt is that of the widow, and should be paid as any other debt. 30 Hun, 619. Drawing out the money was a violation of the order.

Order reversed, with \$10 costs, and proceedings remitted to the court below to proceed upon the application to punish respondent.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## PRIVATE ROADS. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People, ex rel. John Cashman, *applt.*, v. Thomas P. Heddon et al., referees, *respts.*

Decided April, 1884.

Where village trustees, acting as commissioners of highways, determined that a private

road should be laid out, *Held*, It is to be presumed that all preliminary requirements of the statute had been complied with.

Referees appointed to hear an appeal from the determination of such trustees can inquire only into the fitness or unfitness of laying out the road.

The opinion of the tribunal below is no part of the record, and an error appearing only in such opinion is not ground of reversal.

Certiorari to review the decision of referees appointed to hear and determine the appeal brought by relator from the determination of the Trustees of Batavia, as commissioners of highways, laying out a private road across relator's lands.

The relator contends that the record does not show that the necessity of the road has been determined by a jury of freeholders; that laying the road through relator's orchard, without his consent, was erroneous, and that the referees erred in deciding that they had no power to pass upon the question of compensation to the land owner.

*George Bowen*, for relator.

*M. H. Peck, Jr.*, for respts.

*Held*, The record does not show that the necessity of the road has not been determined by a jury of freeholders, and it is to be presumed, from the fact that the trustees, acting as commissioners, determined that the road should be laid out, that all the preliminary requirements of the statute essential to the validity of their action had been complied with. Besides, the record shows that the proceedings of the jury and the notice of appeal were put in evidence before



the referees to show that such proceedings were had respecting the road, and the testimony of several witnesses examined before the referees shows that a jury was called in reference to the road.

The referees could only inquire into the "fitness or unfitness" of laying out the road, and their proceedings in respect to that question are all that can now be reviewed. If the trustees acted without jurisdiction, any order made by them was a nullity, and could be reviewed by common law certiorari and vacated. 63 N. Y., 391, and authorities cited by Earl, J., p. 394.

Upon the merits the testimony warrants the referees' conclusion that the road is necessary, and their decision on that point is conclusive. 1 R. S., 519, §89; Laws of 1847, Ch. 455, §8.

There is nothing in the record showing that the referees declined to pass upon the question of compensation. The case is to be heard on the writ and return and the papers on which the writ was granted. Code Civ. Proc., §2138. The opinion of the referees is no part of the record. 14 N. Y., 435. An alleged error, which appears only in the opinion of the court below, and not in the record, is not ground of reversal. 49 N. Y., 521. See 10 Wend., 123.

Order of the referees affirmed, with \$50 costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## INJUNCTION. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Jacob Crouse, *applt.*, v. The Syracuse, Chenango & N. Y. RR. Co. et al., *respls.*

Decided May, 1884.

The expense of a special train hired by counsel to move to vacate an injunction may be allowed in a proper case as damages sustained by reason of said injunction. Also counsel fees incurred in such service, but not in fact paid, may be allowed.

Appeal from an order confirming a report of a referee upon an assessment of the damages which defendants sustained by reason of an injunction. The defendant corporation had been for four years in the hands of a receiver and was without a Board of Directors. The General Term had held that such a board must exist before the receivership could be vacated and its property could be restored to it. Such election and restoration was sought in various ways but without result, and it was determined by counsel of those interested that they must wait for an election until the day fixed by the by-laws of the corporation, and that an election on any other day earlier or later (unless a year later) would be void. When the day fixed arrived plaintiff served upon the stockholders present at Syracuse an injunction in this action, granted by the county judge of Madison county, which prevented an election. The General Term was at the time in session at Binghamton. Defendants procured a

special train at an expense of \$200 and went to Binghamton. The General Term forthwith vacated the injunction and defendants were enabled to hold their election on the day fixed. The referee allowed this expense and also \$375 for counsel fees. It appeared that, though incurred, this latter expense had not been paid.

*Charles M. Platt*, for applt.

*L. Marshall*, for respts.

*Held*, That the expense of the special train was properly allowed. There was no regular train by which defendants could have reached Binghamton that day while the General Term was in session and under Code, § 626, the General Term was the only tribunal (except the Madison county judge) which could vacate the order. It appears that a few days afterwards plaintiff discontinued his action. Ordinarily such an expense would not be proper, but this was an extraordinary case. Probably and perhaps certainly the election if not held on that day must have been postponed for a year and in the meantime no step could be taken towards restoring the property to the corporation. Large interests were involved and nearly all the stock was represented at the meeting.

We think the counsel fees were properly allowed. They had not been paid but had been incurred, and we think this enough. 50 N. Y., 286; 50 N. Y., 337; 67 N. Y., 553; 15 How. Pr., 320; 22 Ohio, 264; High on Inj., § 1688; 25 Kan., 71.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs; *Bockes, J.*, not voting.

## EVIDENCE.

### N. Y. COURT OF APPEALS.

*Loveridge, respt.*, v. *Hill et al.*, *applts.*

Decided June 3, 1884.

A party is not bound to interrupt the examination of a witness as to a material matter on a mere suspicion that a witness is debarred by his position from testifying, but if on cross-examination it appears that the witness is incompetent a motion to strike out the objectionable testimony may be made.

One P. testified to certain declarations made by defendant. On cross-examination it appeared that they were made to P. as counsel. *Held*, That they constituted a privileged communication as to which P. was debarred from testifying and that refusal to strike out his evidence was erroneous.

Reversing S. C., 15 W. Dig., 190.

This was an action upon a promissory note. One P. was called as a witness by plaintiff, and testified as to certain declarations made to him by the defendant H. It did not then appear that these declarations were made to P. as counsel for H., or while the relation of attorney and counsel existed between them. Upon cross-examination it appeared that the declarations were made to P. by H. as his counsel. Defendant's counsel moved to strike out the evidence of the witness on the ground that he simply testified to matters which came to his knowledge as counsel and that the same were privileged.

Plaintiff objected generally. The referee denied the motion and the defendant's counsel excepted.

*Tracy C. Becker*, for applts.

*Adebert Moot*, for respt.

*Held.* Error; that the witness was debarred from testifying to the declarations of H. by the rule which forbids an attorney from disclosing communications made to him by a client in the course of his professional employment. 80 N. Y., 394; 84 id., 72.

A party is not bound to interrupt the examination of a witness in respect to a material matter on a mere suspicion that the witness may be debarred from testifying. He may await his opportunity on cross-examination to bring out the facts, and if on such examination it appears that the witness is incompetent may move to have the testimony expunged. 56 N. Y., 429.

Judgment of General Term, affirming judgment for plaintiff, reversed.

*Per curiam* opinion. All concur.

## CONSTITUTIONAL LAW. SHERIFF.

### N. Y. COURT OF APPEALS.

Hein, assignee, *respt.*, v. Davidson, sheriff, *applt.*

Decided June 3, 1884.

Sections 1421-1425, Code Civil Procedure, are not unconstitutional. The right of action of the injured party is not thereby taken away or rendered ineffectual, but its enforcement is simply confined to the actual trespassers.

The right to sue a specific individual is not a

constitutional right which cannot be taken away where adequate and complete protection to the right of property is left. Reversing S. C., 18 W. Dig., 381.

This action was brought by plaintiff, as assignee, to recover from defendant for a wrongful seizure by him as sheriff of the property of his assignor. An order was made at Special Term, substituting in place of the sheriff his indemnitors as defendants under sections 1421-1425 of the Code of Civil Procedure, which free the sheriff from liability for a seizure of property where he has taken a bond of indemnity and the sureties seek to be substituted as defendants. This order was reversed by the General Term on the ground that said sections are unconstitutional, as they take away the private property of the citizen without due process of law.

*Morris Goodhart*, for applt.

*E. More, Jr.*, for respt.

*Held.* Error; said sections of the Code do not take away the injured party's right of action, that remains as such unchanged in its inherent character but confined in its enforcement to the real and actual trespassers. The right of action survives the restriction and is in no respect destroyed or made ineffectual.

*Fowle v. Man*, 53 Iowa, 42; *Craig v. Fowler*, 59 id., 200; *Sunberg v. Babcock*, 16 N. W. Rep., 716, distinguished.

The right of the legislature to regulate the civil procedure for the enforcement of rights is wide enough to permit it to say when an officer, acting under the re-

quirements of that procedure, may and may not be sued, provided he is not shielded so as to deprive the citizen of adequate remedy for any trespass or wrong.

The right to sue a specific individual is not a constitutional right which cannot be taken away although adequate and complete protection to the right of property is left.

Order of General Term, reversing order of Special Term, reversed, and order of Special Term affirmed.

Opinion by *Finch, J.* All concur, except *Danforth* and *Rapallo, JJ.*, dissenting.

#### FORECLOSURE. PARTIES. ATTACHMENT.

##### N. Y. COURT OF APPEALS.

Anthony, *applt.*, v. Wood et al.,  
*respts.*

Decided June 3, 1884.

A sheriff, under an attachment against one J. demanded the delivery to him of a note and mortgage then in the possession of J.'s attorney, who refused to deliver them up or give a certificate. The attorney was afterwards compelled to deliver them up to the sheriff, but prior thereto J. assigned them to plaintiff, who brought action to foreclose. *Held*, That until the sheriff obtained the actual custody of the property he could make no levy, and that he had no interest in the action or right to intervene.

This action was brought to foreclose a mortgage which was given to secure a note. Prior to June 2, 1881, the mortgage and note were owned by J., and were in possession of C., his attorney, at New York city. On June 6, 1881, the

note and mortgage were assigned by J. to plaintiff. B., who was sheriff of New York County, was made a party defendant on his own application. B. claimed the note and mortgage in suit under an attachment against J., which was placed in B.'s hands June 2, 1881. On the same day one of his deputies went to C.'s office and demanded that he should deliver up the note and mortgage; this he refused to do or to give a certificate under § 650 of the Code. He was examined June 7, 1881, and thereafter compelled to deliver the property to the sheriff. A judgment was rendered that the amount due on the note should be paid to the sheriff, with a provision for foreclosure and sale upon failure to pay within a time limited.

*James L. Bishop*, for applt.

*Henry G. Atwater*, for respts.

*Held*, Error; that until the sheriff had obtained the actual custody of the note and mortgage in question he had made no levy and could make none. He is armed with power to get such custody and may proceed by action or special proceeding to reach that result. Code of Civil Proc., § 649. The sheriff, therefore, had no interest in the foreclosure or right to intervene.

Judgment of General Term, affirming judgment for defendant B. and interlocutory order, reversed, and judgment of foreclosure ordered for plaintiff.

Opinion by *Finch, J.* All concur, except *Ruger, Ch. J.*, not voting.

## RAILROADS. LACHES.

## N. Y. COURT OF APPEALS.

Vatable et al., *respts.*, v. The  
N. Y., L. E. & W. RR. Co., *applt.*

Decided May 6, 1884.

On foreclosure of a mortgage of the Erie R. Co. its property, etc., was bid in by trustees and the defendant company organized pursuant to chap. 430, Laws of 1874, as amended in 1876, the certificate providing that stockholders of the old company might be let in upon making certain payments on their old stock within a time to be limited, which as finally fixed was Oct. 31, 1878, and notice of the time limited was published in newspapers in England, Scotland, Ireland and this State. Plaintiffs did not make a demand to be let in accompanied by money until after the time limited. In an action to compel a delivery of stock in the new company, *Held*, That plaintiffs could not recover; that a compliance with the plan within six months from the foreclosure sale was a condition precedent, from the performance of which equity could not relieve them.

This action was brought to compel defendant to deliver to plaintiffs a certain number of shares of its capital stock. The grounds of the demand are as follows: Plaintiffs were holders of certain shares of the stock of the Erie R. Co. Its property and franchises were sold under a foreclosure commenced June 19, 1875, judgment being rendered Nov. 7, 1877, and the sale being had April 24, 1878. The property and franchises were bid in by certain purchasing trustees, consisting of certain bond and shareholders of the Erie R. Co., under an agreement which provided for letting in as parties other bond and shareholders if they applied within the time

limited for that purpose. The defendant was organized and took title from the purchasing trustees April 27, 1878. A large number of the bond and shareholders became parties to the arrangement within the time limited, which as finally fixed was Oct. 31, 1878. The plaintiffs did not become parties. Plaintiffs did not make a demand to be let in accompanied by money until Nov. 1, 1878. The plan under which the defendant was organized was drawn up and executed Dec. 14, 1877. It purports to be made under and in pursuance of Chapter 430 of the Laws of 1874, as amended by Chapter 446 of the Laws of 1876, and it was embraced in the certificate executed for the formation of the new corporation. It contains numerous provisions relating to the purchase of the property and franchises of the old company at the foreclosure sale by a purchasing committee, the formation of a new company, the transfer of the property purchased to the new company, and the terms and conditions upon which the stockholders of the old company could become stockholders in the new. Among other things the stockholders of the old company were required to make certain payments upon their stock in that company before they could exchange it for stock in the new company. It was also provided that such payments should be made in New York City or London "before the expiration of such time as may be lawfully limited by the parties either of the first or of the second part,

but with interest," &c. In pursuance of the power conferred upon them by this provision the parties of the first part fixed Oct. 31, 1878, as the last day on which the stockholders of the old company could come in under the plan and make payments on their stock, and gave notice of that fact by publication in many newspapers in England, Scotland, Ireland and in this State. Plaintiffs claim that they never received this notice.

*William W. MacFarland* and *Joseph Larocque*, for applt.

*Frederic R. Coudert* and *John N. Lewis*, for respts.

*Held*, That plaintiffs were not entitled to the relief demanded, that having failed to exercise, within six months from the foreclosure sale, their right to join the new company by a compliance with the terms of the plan as required by the statute they cannot take or claim any rights under the plan; such compliance was a condition precedent; equity cannot relieve plaintiffs from the performance of this condition precedent. 3 G. & J., 265; 1 Vern., 83. Plaintiffs are chargeable with knowledge of the law securing to them the right to assent to the plan within six months.

*Also held*, That the notice by publication given by the purchasing trustees was under the circumstances all the notice that was necessary.

A railroad company, having the right by law to mortgage its property and franchises, can confer upon the mortgagee the same in-

terests and rights which an individual by mortgage of his property can confer. Unless some statute intervenes the foreclosure of a railroad mortgage will cut off all the rights and interests of a railroad company in the mortgaged property, and only the interests of the stockholders and general creditors in the surplus, if any, will remain.

Judgment of General Term, affirming judgment for plaintiffs, reversed and complaint dismissed.

Opinion by *Earl, J.* All concur.

## EMINENT DOMAIN.

### N. Y. COURT OF APPEALS.

*In re* application of The Eureka Basin Warehouse & Mfg. Co., *respt.*, to acquire lands of Peters, *applt.*

Decided May 6, 1884.

The project of the petitioner is not such a public purpose or use as justifies the delegation to it of the right of eminent domain. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use intended of the structures to be built on the property will tend incidentally to benefit the public by affording additional accommodation for business, commerce, &c., is not sufficient to bring the case within the operation of the right of eminent domain so long as the structures are to remain under private ownership and control and no right to their use or management is conferred on the public.

This was an appeal from an order of General Term, affirming an order of Special Term appointing commissioners to ascertain the compensation to be paid by the petitioner on taking lands belong-

ing to P. The petitioner was organized as a corporation in 1867 by filing a certificate of incorporation under the general manufacturing act of 1848. The certificate declared the object of petitioner to be to acquire by purchase, gift or otherwise certain swamp, marsh and other lands in the county of Kings, which were particularly described, and to excavate and construct and maintain one or more basins, docks, wharves and piers, and to erect thereon suitable warehouses, mills, furnaces, foundries, factories, shops and such other buildings as might be necessary and proper for docking, loading and unloading vessels, for the storage of goods and for carrying on generally the business of a dock, warehousing and manufacturing company, and in any and every other proper and suitable way promoting and increasing the facilities for commerce, manufacture and business generally. The amount of its capital stock was fixed "for the present" at \$100,000. On April 28, 1868, "An act to limit and define the powers and privileges of the Eureka Basin Warehouse Company of Long Island" was passed, which empowered the company to commence business when one-half of its capital stock should be subscribed for and ten per cent. paid in, and to enter upon Bushwick creek and the marsh and other lands contiguous thereto in the city of Brooklyn, on the lands described in the certificate of incorporation, or so much thereof as they might acquire by purchase or gift, and

thereupon to excavate, dredge, build, construct, establish and maintain a dock or docks, basin or basins, piers, wharves, warehouses and other buildings necessary and proper for the purpose of docking, loading and unloading vessels and of storing goods and merchandise and for carrying on the general business of a dock and warehousing company, and that said company should be capable in law of purchasing, holding and conveying any real and personal estate which might be necessary or proper to enable it to carry on its operations, and should have the right to demand and receive reasonable compensation for its services and reasonable rent, &c., for the use of its premises. The land proposed to be acquired by the company for excavation of a basin and the construction of buildings and wharves consists of a tract of land in Brooklyn opposite Fourteenth street in the city of New York, extending back from the East River about one mile in length and in some parts about half a mile in width, which tract is intersected by several railroads and numerous streets. By Chapter 637 of the Laws of 1881, amending the Act of 1868, it was provided that in case the company should be unable after reasonable diligence to ascertain the owners of said lands, or to agree with the owners as to the price to be paid for them, title thereto might be acquired by the special proceedings prescribed by law for acquiring title to lands for railroad purposes, and said company was au-

thorized to issue its corporate bonds secured by mortgage, and to sell and dispose of them for the purposes of its organization. The act was declared to be a public act and further provided: "And the basin of said company shall at all times be open to public use for all vessels that may apply therefor, and said company shall commence within one year from the passage of this act and expend thereon not less than ten per centum of its capital." It was further provided that the provisions last quoted should not apply to a certain portion of the premises, which the map of the city of Brooklyn shows would embrace the property available for wharves on the southerly and northerly sides of the contemplated basin, and from its junction with the East River to near the rear of the basin and also much the larger part of the area of the proposed basin, leaving open to the public simply the means of entrance and a comparatively small area in the center of the basin, so that if constructed and wharfed as proposed in the certificate of incorporation the surrounding wharves and warehouses would be the private property of the corporation and the public would have no rights therein.

*Freling H. Smith*, for applt.

*Jesse Johnson*, for resp't.

*Held*, That the project is not such a public purpose or use as justifies the delegation to the company of the right of eminent domain. The taking of private property for private purposes cannot be authorized even by legisla-

tive act, and the fact that the use to which the property is intended to be put, or that the structures to be built thereon will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public.

Order of General Term, affirming order of Special Term appointing commissioners, reversed and proceedings dismissed.

Opinion by *Rapallo*, J. All concur.

## JURORS.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Casey, *applt.*

Decided May 9, 1884.

Where a juror is otherwise incompetent from actual bias he must be required to declare on oath that he believes that his opinion will not influence his verdict and that he can render an impartial verdict according to the evidence; it is not sufficient that he *supposes* he can do so, or that he declares that his opinion *ought not* to influence his verdict.

Where the court held that jurors who failed to so testify were competent and defendant was thereby compelled to exhaust his peremptory challenges before the jury was fully empaneled, *Held*. That the erroneous ruling was not harmless.

The defendant was on trial for murder and interposed challenges for actual bias to several persons



who were called to act as jurors. All of these persons had formed and expressed opinions as to the defendant's guilt, and their answers on being examined were not such as to qualify them. Not one of them testified that he believed the impression or opinion he had formed would not influence his verdict, or that he could render an impartial verdict according to the evidence; the court held that they were competent.

*James M. Covert*, for applt.

*John Fleming*, for respts.

*Held*, Error; that these persons were incompetent to sit as jurors.

When a person called to sit as juror is otherwise incompetent from actual bias he must be required to declare on oath that he believes the opinion or impression formed by him as to the guilt or innocence of the defendant will not influence his verdict and that he can render an impartial verdict according to the evidence, as required by § 376 of the Code of Criminal Procedure, and the court must be satisfied that he does not entertain such a present opinion or impression as would influence his verdict. 80 N. Y., 484, 500; 92 id., 85. It is not sufficient for a juror to simply declare that he supposes he can determine the case according to the evidence, or that his opinion as to the defendant's guilt ought not to influence his verdict, or that he supposes that he would have to go according to the witnesses. The defendant has the right to have the conscience and mind of the juror tested by a declaration under oath,

not simply that he will be governed by the evidence, but by declarations which show that he believes he is in such a state of mind, so free from bias and prejudice, that he can weigh the evidence impartially, uninfluenced by any opinion which he has formed. Bacon's Abr., Juries, E. 5.

These jurors, after the court ruled that they were competent to sit, were peremptorily challenged by defendant and excluded from the panel, defendant thereby exhausting the peremptory challenges allowed him by law before the jury was fully empaneled.

*Held*, That defendant was harmed and his right abridged by the erroneous rulings of the court.

Judgment of General Term, affirming judgment of conviction, reversed and new trial granted.

Opinion by *Earl, J.* All concur.

## TRUST DEEDS.

### N. Y. COURT OF APPEALS.

*Knapp*, recr., *applt.*, v. *McGowan et al.*, *respts.*

Decided May 6, 1884.

A conveyance of a portion of the grantor's real estate upon trust to pay certain creditors and to repay the surplus to the grantor is authorized and valid and an assignment of personal property upon such a trust with a reservation of the surplus does not violate the statute against personal uses.

This action was brought to set aside a trust deed and an assignment made by defendant R. to defendant M., on the ground that it

was made with intent to delay, hinder and defraud R.'s creditors. The trust deed conveyed a portion of R.'s property to M., as trustee, to pay certain of R.'s creditors. It provided that the surplus, after the execution of the trust, should be returned to R. It appeared that R. was solvent at the time of and for some time after the execution of the deed and assignment.

The referee found that the deed and assignment were not made with intent to defraud and that the assignment was in the nature of a mortgage, and that both were made honestly and valid, and dismissed the complaint.

*W. C. Trull*, for applt.

*Luther R. Marsh*, for respts.

*Held*, No error. R. could mortgage his property to secure existing claims as well as future loans and advances. 2 Johns. Ch., 283; 17 N. Y., 521; 21 id., 131; 22 id., 380; 85 id., 43; 93 id., 269.

A conveyance of real estate upon such a trust is authorized by the Revised Statutes, 1 R. S., 728, § 55, and an assignment of personal property upon such a trust, with a reservation of the surplus, does not violate the statute against personal uses. 2 R. S., 135, § 1; 3 Hill, 95; 6 N. Y., 9.

An insolvent and even a solvent debtor cannot convey all his property to trustees to pay a portion of his creditors, with a provision that the surplus shall be returned to him, leaving his other creditors unprovided for, as such a conveyance would tie up his property in the hands of his trustees and place

it beyond the reach of his creditors by the ordinary process of the law, and would hinder and delay them and be void as to the creditors unprovided for.

The complaint was not framed and the action not tried in reference to having the assignee account for any surplus in his hands. The creditors preferred in the trust deed were not before the court. The referee dismissed the complaint without prejudice to plaintiff's right to commence an action against M. for an accounting.

*Held*, No error.

The provisions of the statutes regulating assignments for the benefit of creditors (Laws of 1860, Chap. 348; Laws of 1867, Chap. 860; Laws of 1870, Chap. 92; Laws of 1872, Chap. 838) have reference only to general assignments made by insolvent debtors for the benefit of all their creditors. 85 N. Y., 516-522.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur.

## SALE.

### N. Y. COURT OF APPEALS.

*Ellis, respt.*, v. The Phoenix Natl. Bk., *applt.*

Decided May 9, 1884.

At a sale by the receiver of an insolvent bank plaintiff purchased a claim against defendant for balance due said bank of \$5,629.28, the certificate of sale stating that fact. It appeared that one of the items supposed to make up that sum was a draft sent for collection, but which had not been

collected. It also appeared that there was a larger balance due, which had been confiscated by the government, but that the confiscation proceedings had since been judged invalid. *Held*, That plaintiff having purchased for a good consideration became vested with title to any indebtedness from defendant to said bank up to the sum mentioned in the certificate.

Affirming S. C., 17 W. Dig., 475.

This action was brought to recover from defendant a balance of moneys due from defendant to the Bank of G., sold by its receiver to plaintiff. The certificate of sale states that among the choses in action belonging to the Bank of G., there was a debit balance of \$5,629.23 due from defendant at or near the commencement of the late war. The evidence showed that the receiver found upon the books of the Bank of G. a balance in its favor against defendant of \$129.23, and that a draft had been sent by the Bank of G., to be collected, for \$5,500, which the receiver supposed had been collected, but which had not in fact. The receiver explained to plaintiff before the sale that the balance due from defendant to the Bank of G., consisted of these two items. The item of \$5,500 was marked worthless on the list of assets, and the other item of \$129.23 was not on the list. The receiver swore that all other claims on defendant were sold at the same time. It was also proved that on January 5, 1865, a balance of \$12,117.38, remaining in defendant to the credit of the Bank of G, was seized under proceedings for its confiscation as forfeited to the United States, under which proceedings a judgment of

condemnation and forfeiture was rendered, and hence it was supposed that any claim against defendant was worthless. Those proceedings were afterwards declared invalid.

*Flamen B. Candler*, for applt.

*Frederick H. Man*, for respt.

*Held*, That the sale having been made to plaintiff for a good consideration of the demand of the Bank of G. against defendant, he became vested with the title to any indebtedness due from defendant to the Bank of G. up to the sum mentioned in the certificate of sale.

As to whether the certificate of sale can be contradicted or affected by parol testimony showing what claims were intended to be included in the sale made, *quære*.

Judgment of General Term; affirming judgment for plaintiff, affirmed.

*Per curiam* opinion. All concur.

## CONTRACT.

### N. Y. COURT OF APPEALS.

*Cornell, respt., v. Cornell et al., applts.*

Decided May 9, 1884.

To entitle a party to recover on a contract to compensate him for the support and maintenance of a third person he must actually furnish such support and maintenance. The other parties to the contract cannot be called upon to pay for the support such third person has refused to receive.

This action was brought to recover a sum of money on a covenant in an agreement between plaintiff and defendants dated Oct.

15, 1873, by which, in consideration of plaintiff's obtaining a satisfaction from one S. C. of a \$2,000 mortgage, the defendant M. C. agreed to and did assign to the other defendant \$250 and a mortgage of \$5,000, in trust, with power to satisfy it for reinvestment in a like good security, for payment to plaintiff of \$200 per annum semi-annually during the life of S. C. for his support and maintenance. In consideration thereof plaintiff covenanted to support and maintain S. C. so long as said \$200 was paid annually as aforesaid. The complaint alleged that defendants made semi-annual payments up to and including that which became due April 15, 1875, but since then have made default; that plaintiff has performed all his covenants. Plaintiff demanded judgment for the semi-annual payments falling due since April 15, 1875, at which time S. C. left plaintiff's house. Defendants answered jointly, admitted the execution of the agreement and payment according to its terms, but denied that any sum was due plaintiff, or that he had performed the covenants on his part in said agreement and that he supported or maintained S. C. or provided for his support. A jury was waived and the issues tried before the court, and an interlocutory judgment was rendered against G. as trustee, not individually, for an accounting and the payment of the money in the hands of the defendant as trustee.

*John A. Deady*, for appls.

*James W. Culver*, for resp't.

Vol. 19—No. 8b.

*Held*, That the issue would necessarily have been tried by a jury Code § 968, if a jury trial had not been waived, and then an interlocutory judgment could not have been given, but a jury having been waived plaintiff might have such judgment if a proper case was made out, with like effect as if the action was originally triable by the court. Code § 1207; 90 N. Y., 372.

*Also held*, That to entitle plaintiff to receive any part of the proceeds of the trust money he was bound to actually furnish to S. C. support and maintenance; that having been paid so far as he has furnished it he is entitled to no more; defendants cannot be called on by plaintiff to pay for support S. C. has refused to receive.

Order of General Term, denying motion for a new trial, reversed and new trial granted.

Opinion by *Danforth, J.* All concur.

## FRAUD. PAYMENT.

### N. Y. COURT OF APPEALS.

*Roach et al., respts., v. Duckworth, applt.*

Decided April 15, 1884.

Defendant, to secure a loan to a corporation, took \$8,000 bonds of the company as collateral, which upon non-payment of the loan he sold to one J. for \$640. J. brought suit against R. as trustee, and recovered the amount of the bonds. Defendant afterwards brought suit on his debt against plaintiffs as trustees and recovered judgment for the amount of his loan less the amount received from J. Afterwards R. settled the J. judgment by paying \$1,300. In an action to restrain the second judgment, *Held*,

That defendant could not be charged with fraud in the transaction as he was entitled to receive the amount due him for the loan and his costs, but that as the payment to J. was made in good faith without knowledge of defendant's rights, defendant was bound by it and must allow such payment on the amount due him on the loan.

In April, 1873, defendant loaned \$6,000 to a corporation formed under the general manufacturing act of 1848. In October following C., one of the trustees of the corporation, to induce defendant to forbear payment of his loan, delivered to him six \$1,000 bonds of the corporation, dated in March, 1873, and due in March, 1874, to be held by him as collateral security for his claim. C. had paid full value for these bonds. Defendant's claim not having been paid, in May, 1876, he sold the bonds at public auction to one J. for \$640. In June thereafter, J. brought an action in the Supreme Court against plaintiff R. as one of the trustees of the corporation, to enforce his liability to him on account of the bonds thus purchased under section 12 of the act of 1848, for not making the report required for the years 1874, 5, 6. In February, 1877, defendant brought an action in the New York Court of Common Pleas against R. and the other trustees of the corporation, who are the plaintiffs here, to enforce their liability under such section on account of the debt due him, for failing to make the report required for the years 1874, 5, 6, and 7. Both actions were defended, the first resulted in a judgment for J., in February, 1877, for the full amount of the bonds and costs,

and the latter in a judgment for defendant herein, June, 1878, for the balance due him on account of his loan after deducting some interest which had been paid and the \$640 received upon the sale of the bonds to J. Both judgments were appealed from. Afterwards in January, 1879, R. settled and procured the satisfaction of the first judgment by paying J. \$1,300. The second judgment was affirmed by the General Term, and afterwards in this court in 1880. In the same month plaintiffs brought this action to restrain forever the collection of the three judgments, to wit, the original judgment recovered against them by the defendant here, and the two judgments for costs upon the appeals on the ground that the sale of the bonds to J. was a sham, J. having purchased them for defendant and commenced and prosecuted the actions for him and solely for his benefit; that defendant had but one debt against the corporation which he could enforce against the trustees, who were liable to him but for one penalty; that the first action and the recovery therein, if they had known the facts, could have been pleaded as a bar to any recovery in the second action, but that they were ignorant of the facts and did not discover them until March, 1879; that defendant here had perpetrated a fraud which entitled plaintiffs to the relief claimed.

*L. L. Van Allen*, for applt.

*Geo. W. Van Sicklen*, for respts.

*Held*, That defendant cannot be chargeable with any fraud upon

plaintiffs; he was entitled to receive the amount due him for his loan and the costs; that the payment of \$1,300 to J. having been made in good faith without knowledge of defendant's rights, defendant must be bound by it and allow said sum as a payment upon the amount due upon his loan; that the sum of \$640, bid by J. at the sale of the collaterals, having been allowed, the balance of the \$1,300, after deducting that sum and the costs, should be allowed as a payment upon defendant's judgment, and the balance of the judgment he should be allowed to collect. Plaintiffs' remedy is to tender or pay the sum due and if defendant refuses to cancel the judgment they can apply to the court by motion to compel cancellation or to stay execution. A suit in equity is not needed and is not the proper remedy. 1 Johns. Ch., 49. As to the two judgments for costs upon the appeal there can be no relief.

Judgment of General Term, affirming judgments for plaintiffs, reversed, and complaint dismissed.

Opinion by *Earl, J.*; *Rapallo* and *Finch, JJ.*, concur, *Miller, J.*, reads dissenting opinion, *Danforth, J.*, concurs, *Andrews, J.*, not voting.

#### FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Phebe Schuster et al., respts., v. The Dutchess Co. Mutual Ins. Co., applt.*

Decided May, 1884.

One of the plaintiffs swore to a proof of loss which stated that they were owners of real estate in which, in fact, they had no interest. The plaintiff believed, however, that he had an equitable interest. By the same policy personal property was also insured. It was conceded that the policy was void as to the real estate. Upon the trial of this action to recover for the personal property, the court charged generally that fraud would prevent a recovery and allowed proof of the misstatement as to the real property. Defendant then requested a charge that if the plaintiff made, swore to and delivered the proof of loss intending to obtain the amount of insurance on the real property, knowing that plaintiffs were not the owners, such false proof prevented a recovery for the personal property. The court refused. *Held*, That as the contract was separable the refusal was not erroneous.

The action was upon an insurance policy and had been before the General Term before. 30 Hun, 222; 17 W. Dig., 383. Upon the authority of *Merrill v. Ag. Ins. Co.*, 73 N. Y., 452, the General Term held that although the policy was confessedly void as to the real estate it could be sustained as to the personal estate, insurance upon which was separately stated. It appeared that one of the plaintiffs, though not owner of the real estate, believed he had an insurable interest in it, which proved to be not the fact. Upon the trial plaintiff recovered for the personal property. The court among other things charged that if there had been any fraud practiced upon the company by plaintiffs they could not recover. The court allowed evidence bearing on this question, of the fact that although the proofs of loss stated that plaintiffs

were owners of the real estate they really had no title. Defendant then asked the court to charge that if the plaintiff Louis Schuster made and swore to the proof of loss and delivered it intending to obtain the amount of insurance on the house, knowing that he and his wife were not the owners, such false proof prevented a recovery for the personal property. The court declined. Plaintiffs had a verdict.

*T. F. Bush*, for applt.

*T. A. Niven*, for respts.

*Held*, That the charge requested was properly refused. The court had charged generally that fraud would avoid the contract. The effect of defendant's request was for a charge that an untrue statement not fraudulently made as to the real property would defeat a recovery as to the personal property. We do not think so. The case in 73 N. Y., *supra*, holds the contract to be severable and (in the absence of actual fraud) plaintiffs should recover.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs; *Bockes, J.*, dissents.

#### DEED. COVENANT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Jesse Robinson, *respt.*, v. William Robinson, *applt.*

Decided May, 1884.

Where at the time of conveying land by deed there are fences upon the premises, but no reference is made to them as mon-

uments in the deed, the land being described by metes and bounds and number of acres, the courses and distances and quantity as therein given will control in determining the rights of the parties under the conveyance.

If the grantor has no title to a portion of the land embraced within the lines of the description, the grantee may recover for the deficiency of quantity in an action upon the covenant of warranty.

Appeal by defendant from a judgment entered against him on the direction of a referee.

Action for a breach of the warranty contained in a deed of lands made by defendant to plaintiff; the latter charging that there were conveyed to him, by the description in the deed, four acres lying along the southerly line of the premises to which the former had no title at the time, and of which plaintiff never got possession, and which have been at all times since held against him by other persons by paramount title. The starting point in the description of the premises, in the deed, was the northeast corner of Lot No. 207. The next call in the description was "westerly along the north line of Lot 207, north 88 degrees and 30 minutes west, 23 chains and thirty links;" and following this line were seven others giving specific courses and distances, making no reference to any monument whatever. These lines were, in the deed, declared to include 125 acres and 147 rods of land. This was found to be accurate by computation.

*Babcock & Harrower*, for applt.

*D. S. Richards*, for respt.

*Held*, That the parties intended

that the courses, distances and quantity as given in the deed should control in determining the rights of the parties under the conveyance.

*Held also*, That it was apparent from the deed itself and the surrounding circumstances that it was intended to convey a specific parcel of land, to wit: 125 acres and 147 rods embraced within the lines described by courses and distances.

Judgment affirmed, with costs.

Opinion by *Bockes, J.*; *Boardman, J.*, concurs.

#### RAILWAYS. COMMISSION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*In re* application of the B., N. Y. & P. RR. Co., *applt.*, for commissioners to appraise lands of George S. McIntosh, *respt.*

Decided April, 1884.

The court will inquire into the regularity of the proceedings leading to even the second report of commissioners, and will set such report aside for fraud or misconduct.

Certain actions of commissioners held irregular, and their report set aside.

Appeal from Special Term order, denying motion to set aside the commissioners' report herein awarding to respondent \$1,000 damages for the right of way through his lands.

This is a second report. The premises consist of a farm near Allegany. On the day when the commissioners viewed the premises, they met at Allegany and went thence to the farm in a car-

riage provided by the land owner, and accompanied by him, his counsel and a driver. When they left Allegany the company's attorney and agent were there, but were delayed in starting for the farm until some time after the other party had left. Immediately on the arrival of the first carriage at the farm, the owner, without waiting for the other party to come up, although he and the commissioners knew that they were on their way to the farm, began to point out to the commissioners the boundaries of his farm; produced, at his counsel's request, a map of the same; spread it out before the commissioners; and, in his own words, "began to call the attention of the parties present to the same and the shape and general lay of such of the land comprising the farm as was not visible from that point." When the second party arrived they produced another map, and some dispute then ensued. Very soon after the second carriage came up the commissioners said they had seen enough and were ready to return, but, upon being urged, they did go upon the rear of the farm and make further examination. One of the commissioners took supper at the landowner's house, and was then taken home in a carriage furnished by the landowner; and another, after the report was signed, accepted from the landowner a sum of money for his services and expenses in excess of the amount allowed by statute, and which was so understood to be at the time.



*Ansley & Davie*, far applt.

*George H. Phelps*, for respt.

*Held*, That although the statute provides that the second report shall be final and conclusive, Laws of 1850, Ch. 140, § 18, yet that provision does not preclude the court from inquiring into the fairness and regularity of the proceedings before the commissioners and from setting aside their report for fraud or misconduct. 20 Hun, 184; 24 id., 199.

It was irregular to begin the hearing before the company's representatives arrived, and as it is impossible to say that what then took place did not affect the minds of the commissioners the irregularity is fatal to the report.

The other acts mentioned, while doubtless prompted by no wrong motive, ought to have been avoided. Were such acts to become common designing men could easily make them a cover for corruption.

Order reversed, report set aside, and case sent to other commissioners to be appointed on motion at Special Term, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### FRAUD. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Rufus A. Sibley et al., respts.*,  
*v. Lucy T. Killom et al., exrs.*,  
*appls.*

Decided April, 1884.

Certain evidence held sufficient to support the finding by a jury that a certain purchase of goods was fraudulent.

A schedule verified and filed by an assignor, and being a part of the assignment, and necessary to its validity, is competent evidence against the assignee.

Appeal from judgment on verdict at circuit and from order denying motion for a new trial on the minutes.

Replevin for goods alleged to have been purchased from plaintiffs by one F. on credit, fraudulently, and by F. assigned to K., defendant's testator, in trust for the benefit of F.'s creditors.

Defendant's answer admitted that the goods were sold by plaintiff to F. on credit, in Oct., Nov. and Dec., 1879. The assignment from F. to K., which was put in evidence, bore date and was acknowledged Feb. 19, 1880. It was a general assignment for the benefit of creditors, it was signed and acknowledged by the assignor and the assignee, and it recited that the assignor was indebted to divers persons in sundry sums which he was unable to pay in full. It preferred more than \$1,800 of debts, most of which existed prior to the purchase from plaintiffs. Those debts were specified in a schedule annexed to the assignment and referred to therein. It also appeared by a schedule produced from the County Clerk's office, and verified by F.'s affidavit, March 9, 1880, that the whole amount of debts exceeded \$4,500. There were in evidence three conveyances of real estate executed by F. and wife, dated September 8, 1879, and acknowledged Sept. 12, 1879, two of

which were to one G. and the other to one C. One deed to G. expressed \$1,000 consideration, and conveyed subject to a mortgage executed to defendant's testator to secure his indorsement of two notes for \$500 each, made by F. in 1876 and 1877. The other deed to G. expressed \$1,500 consideration. The deed to C. expressed \$1,200 consideration, and was subject to a \$900 mortgage made by F. in 1874. It was proved that on Sept. 12, 1879, C. and wife deeded the same premises to F.'s wife for the same consideration and subject to the same mortgage. Defendants made no proof.

*N. Morey*, for appls.

*E. Harris*, for respts.

*Held*, That the jury very clearly were authorized to infer that when F. made his purchases of plaintiffs he was largely insolvent and knew it, and made the purchases on credit with the preconceived intent not to pay for them.

The schedule verified by F. was properly received in evidence. It was made and filed in compliance with the statute. Laws of 1877, Ch. 466, § 3. Being made by the assignor it relieved the assignee from making one. Had both parties neglected to make one the assignment would have been void. Id., § 3, subd. 5. It was therefore a part of the assignment necessary to its validity, and for that reason was competent evidence against the assignee and the defendants representing him.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Har-*

*din, J.*, concurs in result; *Barker, J.*, dissents.

### CREDITORS' ACTION. PARTIES.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Joseph S. Lowery et al., *respts.*,  
v. Calcina B. Clinton et al., *appls.*

Decided April, 1884.

Judgment creditors who seek by their complaint to remove a fraudulent obstruction must show that such removal will enable the judgment to attach upon the property, and where the debtor has made a valid general assignment for the benefit of creditors the assignee should be joined as defendant to the complaint.

Appeal from Special Term judgment overruling a demurrer to the complaint.

Plaintiffs, as judgment creditors of Calcina B. Clinton, seek to set aside as fraudulent against creditors a written assignment, made June 1, 1878, by Calcina to her children, who are also made defendants, of certain insurance policies upon her husband's life, which her husband had assigned to her in his lifetime. Plaintiff's judgment was recovered and docketed January 23, 1880, and execution was duly issued thereon and returned unsatisfied. The complaint alleges that in July, 1878, said Calcina, being insolvent, made a general assignment of all her property for the benefit of creditors, and that she has since remained and is now insolvent; that she was insolvent when she transferred the policies, and that said transfer was made without consideration,

with intent to hinder, delay and defraud her creditors, all which was well known to her children. The complaint does not question the validity of the general assignment. Demurrer on the ground that the general assignee should have been made defendant, and that the complaint does not state facts sufficient to constitute a cause of action.

*J. A. Lynes*, for Calcina B. Clinton et al., appls.

*Carlton B. Pierce*, for Fannie C. Clinton et al., appls.

*William Kernan*, for respts.

*Held*, That the general assignment must be presumed to be valid as between the parties to it and as against plaintiffs, and plaintiffs are not in a position to attack the validity of the transfer of the policies. If the transfer is declared void, the general assignment remains an obstacle in the way of applying the policies to the payment of plaintiff's judgment. 90 N. Y., 538; 17 W. Dig., 546; 63 N. Y., 252; 72 id., 424; 90 id., 492, and cases cited by Earl, J., p. 498.

The general assignee is a necessary party, and his absence in this case is fatal to the action, even if the complaint were sufficient in other respects.

*Leonard v. Clinton*, 26 Hun, 288, criticised.

Judgment and order reversed, and judgment ordered sustaining demurrer, with costs, giving plaintiffs leave to amend in twenty days, on payment of costs of demurrer, of trial at Special Term and of this appeal.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## REPLEVIN.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Elizabeth Donald, applt.*, v. *William Rockwell, respt.*

Decided May, 1884.

In an action to recover chattels plaintiff's affidavit alleged that she was entitled to the possession by virtue of a special property in said chattels, to wit, as sole legatee of D.; that D. died seized and possessed of the property which formerly was in the possession of his executor and that the executor had absconded. *Held*, That the affidavit was defective and contained no facts showing a special property.

Action to recover a chattel. In her affidavit plaintiff alleged that she was lawfully entitled to the possession of the property replevied by virtue of a special property therein, to wit, as sole legatee of James Donald, which property, as alleged, was in the possession of the executor of his will but said executor had absconded and was not within the State. At Special Term the affidavit was held defective and an order made restoring the property replevied and setting aside the proceedings.

*H. C. Hall*, for applt.

*Sheldon & Petrie*, for respt.

*Held*, Under Code Civ. Pro., § 1695, where plaintiff claims to be entitled to the possession of chattels by virtue of a special property therein the facts must be set forth. None are shown which prove a special property. The title is in the executor. If he has delivered the prop-

erty to plaintiff as legatee then she is owner and has not a special property. If he has not delivered the property to her he is the owner still; unless he has sold the property, which he may have done lawfully, so far as appears by the affidavit.

Order affirmed, with costs.

*Per curiam* opinion.

### STATUTE OF FRAUDS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

James N. Jobe, *respt.*, v. Thomas Davidson, *applt.*

Decided May, 1884.

In 1869 the parties entered into a verbal agreement by which plaintiff left with defendant certain sheep, which plaintiff was to have at any time he called for them, he to have the natural increase; this increase was agreed to be their doubling in three years. In 1878 plaintiff demanded the sheep and their increase at the above rate. *Held*, That the contract was not void by the statute of frauds because verbal and was one which could be performed in a year.

The action was begun in justices court. The complaint alleged that defendant took from plaintiff a number of sheep which he agreed to return to plaintiff when plaintiff should call for the same, with their increase; that defendant failed to do so on request. The answer was a denial and set off. It appeared that before the making of the contract in suit plaintiff had worked a farm of defendant's. At the adjustment of that matter there remained ten sheep, five of which belonged to plaintiff and five to

defendant. At that time, in 1869, a verbal contract was entered into, out of which this action arose. Plaintiff's statement (the jury found in his favor) of it is: "I was to leave the five sheep and defendant was to take them and I could have them at any time I called for them or wanted them or had a place to put them, whether it was three, six or nine years longer or shorter; if I got a place in three months or six months. I was to leave them and he was to give me the natural increase. He told me it would be at the rate of doubling every three years." Plaintiff also said, "I expected if I called for these sheep to get back the identical sheep, or if dead I expected defendant to return them just as good." In 1878 plaintiff demanded forty sheep, doubling five for three periods of three years. The county judge charged the jury that if they believed the plaintiff it was a contract to have the same sheep back and also to have the increase at the rate of doubling every three years. Plaintiff recovered. Defendant claims that the contract was void because verbal and could not be performed within a year. The case has been at the General Term before, 28 Hun, 442, but the question of the statute of frauds was not passed upon.

*Bates & Merritt*, for *applt.*

*T. A. Reed*, for *respt.*

*Held*, That the charge was correct. We think the contract could be performed within a year. In *Bartlett v. Wheeler*, 44 Barb., 162, which is claimed to be an au-

thority for defendant, the defendant was at the end of four years to return twenty sheep of as good quality; but not necessarily the same ones. The plaintiff here testifies that he could have the sheep at any time and also that he expected the same sheep back. It is evident that the arrangement was one which either party might terminate at pleasure.

It is said by way of argument that the contract must have run at least three years, because if plaintiff could take his sheep at the end of one year defendant must deliver one sheep and two-thirds of a sheep, which would be absurd. Perhaps if such a demand had been made defendant would have been excused, because it would be impossible for him perform.

But the jury might have found on the evidence that the agreement was that *so long* as defendant kept the sheep he should compensate plaintiff in the agreed manner. This would be a bargain which could be performed in a year, but which the continuing agreement of the parties might extend to a much longer period.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### TAXES. CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respts.*, v. The Knickerbocker Ice Co., *applt.*

Decided May, 1884.

A corporation organized for the purposes of "collecting, storing and preserving ice, of preparing it for sale, of transporting it to the City of New York, or elsewhere, and of vending the same," is not a manufacturing corporation within the meaning of Chap. 542, Laws of 1880.

Appeal by defendant from judgment entered on report of a referee in favor of plaintiffs.

This action was brought by the Attorney-General to recover a tax alleged to be due to plaintiffs from defendant under the provisions of Chap. 542, Laws of 1880, and the amendments thereto.

*D. O'Brien*, Attorney-General, for plffs.

*Moses B. Maclay*, for deft.

*Held*, That the judgment appealed from is right unless defendant is a manufacturing corporation within the meaning of Chap. 542, Laws of 1880. If it be a manufacturing corporation it is exempt from the tax attempted to be collected in this action.

The object for which the defendant corporation was organized, as expressed in its articles of association, are "the collecting, storing and preserving ice, of preparing it for sale, of transporting it to the City of New York, or elsewhere, and of vending the same."

This is not a manufacturing business in any ordinary sense applied to such words. Nor is the business as actually done a manufacturing industry. It is the same as the removal of marl or peat from a bed, of coal from a mine, 106 Mass., 131, or of water through pipes from a pond. 100 Mass., 183.

The legislature has given an in-

terpretation of defendant's business by the passage of the Act of 1855, Chap. 301, under which defendant is incorporated. By that a corporation was authorized to be created for the purpose of "collecting, storing and preserving ice," &c. No such legislation was necessary, if Chap. 40 of the Laws of 1848 provided for such a corporation, because the latter act gave full power and authority for organizing manufacturing companies. 92 N. Y., 487.

For both reasons above given we think the judgment is right and should be affirmed.

Opinion by *Boardman, J.; Learned, P. J., and Bockes, J.,* concur.

#### MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Thomas C. Durant, recr., *respt.*,  
v. George Kenyon et al., *appls.*

Decided May, 1884.

A mortgage stated that there was conveyed thereby all the real property of the corporation in the county of Saratoga and particularly all lands immediately adjoining the line of its road and which were designed to be used in operating the said railroad. *Held*, That under these words passed all the real property which the company owned in the county at the time the mortgage was executed.

The action was ejectment, both parties claiming title from the same source. Plaintiff claims under a foreclosure. The mortgage, which was by a railroad company, conveys "all the real property of said party of the first part or to which said party has any right,

title or interest legal or equitable, situate in either of the counties of Saratoga, &c. \* \* \* and particularly all lands immediately adjoining the line of said road and which are designed and intended to be used in operating the said railroad," &c. Immediately following are words "also the following pieces, &c.," sixteen in number, covering 157,152 acres in other counties; said pieces being described by metes and bounds. The land in question adjoins the railroad line in Saratoga county, but appellant claims that the true construction of the mortgage is that only such lands in Saratoga county were thereby conveyed as immediately adjoined the line of the road and were designed to be used by the company for railroad purposes. Plaintiff had a verdict.

*P. H. Cowen*, for applt.

*A. Pond*, for respt.

*Held*, That all land of the company in Saratoga county were conveyed by the above words. Under such a phrase it is only necessary to establish that the company owned the lands when it gave the mortgage. And that is admitted. Such general words are often used in assignments of insolvent debtors and in wills. They are not void for uncertainty. That is certain which can be made certain. We see no reason why a man may not by general words mortgage all the land he owns in a county.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.; Boardman* and *Bockes, JJ.*, concur.

## CONVERSION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Mortimer E. Serat, *respt.*, v. The Utica, Ithaca & Elmira R.R. Co., *applt.*

Decided May, 1884.

Plaintiff and others built a trestle which defendant converted to its own use. Thereafter plaintiff procured an assignment of the interest of his associates in the property and then demanded possession of it of defendant which was refused. He then brought this action for a conversion. At a Special Term the court found a conversion as of the date of the demand. *Held*, That the finding was proper and that the action could be maintained; that the former conversion did not affect the question of plaintiff's rights of action.

This action was brought to recover for the conversion of a coal trestle. This was built in 1881 by a partnership called the Valley Coal Co., which consisted of plaintiff, Seth Serat and one Smith. In Jan., 1883, defendant wrongfully took possession of it. On July 3, 1883, plaintiff took a written assignment of the interest therein of Seth Serat and Smith. On July 12, 1883, he demanded possession, which was refused. He brought this action. The evidence is not given in the case. The judge who tried the cause gave judgment for plaintiff and found a conversion on July 12, 1883, as to plaintiff, and also found that defendant converted the trestle to its own use Jan., '83. Defendant claims that these findings are inconsistent and that they do not support the conclusions of law; that as the assignment was after the conversion of January it passed no title.

*Brown & Armstrong*, for *applt.*  
*Gabriel L. Smith*, for *respt.*

*Held*, That the findings and conclusions were consistent. The previous conversion, i. e., of Jan., 1883, does not affect the question. The wrongful act of the defendant did not deprive the Valley Coal Co. of its title and plaintiff is its assignee. 81 N. Y., 39.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*;  
*Boardman* and *Bockes, JJ.*, concur.

## HABEAS CORPUS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. Edward Evans, *respt.*, vs. John McEwen, superintendent, *applt.*

Decided May, 1884.

Where no traverse is made of the facts set forth in a return to a writ of habeas corpus, those facts must be taken to be true and the court cannot consider any allegations in the petition upon which the writ was granted.

Where a prisoner has been legally sentenced and is in the proper custody he cannot be released because the mandate in the hands of the superintendent of the penitentiary is not a true copy of the record.

The relator was sentenced by the Recorder of Binghamton for an assault to imprisonment in the Albany penitentiary. He sued out a writ of habeas corpus before the Recorder of Albany, alleging as a reason for his discharge that the mandate in the hands of the defendant was not a copy of the record of conviction. The return set up that the relator was detained

by virtue of a warrant and also by judgment of conviction, &c. The return was not traversed. The Recorder of Albany, upon what ground does not appear, ordered the discharge of the relator.

*D. Cady Herrick*, for applt.

*G. R. Hitt*, for relator.

*Held*, That the order was erroneous. Upon a return being made the court is to examine into the facts alleged in it. Code Civ Pro., § 2031. If there is no traverse those facts must be taken as true. 1 Park Cr., 127; 16 Hun, 214. We cannot therefore examine the affidavit upon which the writ was obtained. Besides the return expressly denies everything not therein admitted. The record seems to be in proper form and to be sufficient. But if the warrant was not a copy of the record the prisoner should not be released for an imperfection in it. He has been properly and legally sentenced and is in the proper custody. 89 N. Y., 460.

Order reversed and prisoner remanded.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People v. The Globe Mutual Life Insurance Company. Matter of claim of Marie Oesterle, *applt.*

Decided March 7, 1884.

A person holding a policy of life insurance does not forfeit such policy by omitting to

pay the premiums when the company issuing the policy has ceased to do business, transferred its assets and become insolvent, for the further payment of premiums is excused by such insolvency; but the mere fact of an apparent or assumed insolvency, without a formal declaration thereof, does not excuse the payment of the premium.

Where, at the time when a premium on a policy of life insurance had become absolutely due, a committee of the trustees of the company issuing it, appointed to investigate the condition of the company, had agreed to report that the said company was insolvent, but such report was not signed and proceedings to wind up the company were not taken until after the said premium became so due, and default was made in its payment without such insolvency of the said company being alleged as a reason for such default, *Held*, That the policy was forfeited.

*Semle*, That the policy would not have been forfeited if the insolvency of the company had been given as the reason of the non-payment of the premium.

Appeal from order confirming the report of a referee.

On the 15th day of April, 1879, a premium became due upon a policy of insurance issued by the Globe Mutual Life Ins. Co. on the life of Jno. E. Oesterle for the benefit of his wife; but, by a clause in said policy, 30 days' grace in the payment of said premium was given, which made it absolutely due on the 18th day of May, 1879. On the 29th day of March, 1879, the trustees of the said company appointed a committee to investigate its condition, and on the 15th day of May, 1879, such committee had agreed to report that the company was insolvent, but such report was not signed until May 26, 1879, and proceedings to wind up the affairs of the company were not com-



menced until the 27th of that month. Meanwhile, on the 18th day of May, default had been made in the payment of the premium on the policy of Oesterle without the insolvency of the company being assigned as the reason for such default. Jno. E. Oesterle died on Sept. 25, 1879, and a claim against the receiver of the Globe Mutual Life Ins. Co. was made under the policy on his life on behalf of his widow. Such claim was referred to a referee, who reported unfavorably upon it.

*Raphael J. Moses, Jr.*, for applt.

*George W. Wingate*, for respt.

*Held*, That a person does not forfeit his policy by omitting to pay the premiums when the company issuing the policy has ceased to do business, transferred its assets and become insolvent. That the implied contract it makes with its policy holders is that it will continue business and keep able to perform its obligations, 27 Albany Law Journal, 372, and the further payment of premiums is excused by the insolvency of the company. 82 N. Y., 339.

But that the mere fact of an apparent or assumed insolvency, without a formal declaration thereof, will not excuse the payment of premiums, Daily Reg., March 25, 1882; 10 Insurance Law Journal, 337, and consequently such payment was not excused in this case.

*It seems*, That if the omission to pay had been put upon the ground of the insolvency of the company, the claimant might have had the

benefit of that incident, Daily Reg., March 25, 1882, but that it is not certain under the authorities.

Order affirmed.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

## CONTEMPT. LEGISLATURE. CONSTITUTIONAL LAW.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

The People *ex rel.* William McDonald, *applt.*, v. William H. Keeler, Sheriff, *respt.*

Decided May, 1884.

The Legislature has no power, except when exercising the limited judicial powers expressly given it by the Constitution, to punish a witness as for a contempt in refusing to answer a question put to him by a duly authorized legislative committee.

The Statute, 1 R. S., m. p. 154, § 18, subdiv. 4, which confers upon each house power to punish such a refusal as a contempt and by imprisonment, is unconstitutional; the legislature cannot confer upon itself authority to try, convict and punish in a proceeding (*e. g.*, for a contempt) which is clearly judicial.

The rights of one thus imprisoned by the Senate may and must be considered and passed upon by the court in the habeas corpus proceedings. The prisoner should not be remanded, as there is no other proceeding or manner in which the matter can be presented.

Upon such an examination before a legislative committee the witness is entitled to counsel.

The materiality of the questions put the witness in this case considered.

This is an appeal from an order dismissing the petition and proceedings of relator to be discharged from imprisonment on habeas corpus. On Jan. 14, 1884, the Senate of New York, by resolution,

directed the Committee on Cities to investigate the Department of Public Works in the city of New York, and to ascertain whether "certain grave charges of fraud and irregularity" made by the "public press and by the Union League Club of the city of New York" against Hubert O. Thompson, the chief of said department, were true. The committee was authorized to "send for persons and papers," and directed "to report the result of such investigation and its recommendation concerning the same to the Senate on or before the 15th day of April, 1884." The relator was examined as a witness before said committee. He was examined at length, principally about limestone chips, gravel and earth which he had furnished the department. He was then asked certain questions which his counsel advised him not to answer. A member of the committee then moved that the right of the witness to have counsel be no longer recognized. The motion was carried. The questions his counsel objected to related to where witness got and what he paid for the material furnished the department, the names of his workmen and what his capital and profits were in the coal business (witness had testified he carried on this business as well as that of contractor for materials). At a former hearing, when no counsel for the witness was present, witness had been asked and answered questions which tended to degrade him, *e. g.*: Whether he had ever been arrested for getting material

without the owner's consent, to which he answered that he had not been; also whether he had not banked up material on a man's land without his permission; witness denied this. After his counsel was denied further recognition by the committee witness refused (by his advice) to answer the questions above mentioned. He was adjudged by the Senate to be in contempt and was committed to the jail at Albany until the adjournment of the Legislature unless sooner discharged by order of the Senate. He sued out a writ of habeas corpus, but his application for a discharge was denied below. He appeals.

*T. C. E. Ecclesine* and *Hamilton Harris*, for applt.

*F. W. Whitridge* and *B. F. Tracy*, for the Senate.

*N. C. Moak* and *Henry Smith*, for the Sheriff.

*Held*, That, except when engaged in the exercise of the judicial powers given it by the Constitution, the Legislature has not the power to punish as for a contempt. The cases of *Doyle v. Falconer*, L. R., 1 Privy Council, 328, and *Kilburn v. Thompson*, 103 U. S., 168, are conclusive on this point. In *Doyle v. Falconer*, *supra*, it is shown that the Assembly of the island Dominica, an English colony, has not the power of punishing a contempt although committed in its presence and by one of its members; that case and others show that there is no analogy between such an assembly and the House of Parliament; that the

*lex et consuetudo parliamenti* belongs to that body because of its judicial functions; that the Commons can punish for contempt because they are a part of the high court of parliament, a judicial body, the highest court in the realm, which had always possessed this power by ancient usage. L.R., 3 Privy Council. 560; 4 Moore P. C., 62; 11 id., 347.

The inquiry then arises, did Parliament or the English Government ever grant to the colonial legislature of New York the privileges of Parliament? No such grant is shown or, we think, can be found. Nor does the Constitution of 1778, Section xxxv., assist the respondent. That only provides that such parts of the common law as formed the law of the colony shall continue. If we concede that the phrase "common law" includes the privileges of parliament, which is doubtful, we have seen from the cases cited that the doctrine of the common law is that the power to punish for contempt in not answering questions belonged to the courts and to legislative bodies. The constitutions of 1821 and 1846 do not give the power asserted.

The question here does not touch that power of the Senate or Assembly to keep order in its own rooms, to judge of the qualifications of its own members and to expel them for improper conduct.

Here must be noticed that by the constitution the legislature has certain judicial powers, to judge of the qualification of its own members, art. 3, § 10; to re-

move certain judicial officers, art. 6, § 11, and to impeach, art. 6, § 1. It may be that in cases of this kind the legislature can punish a refusal to answer. But the present is not such a case.

It is further claimed that 1 R. S. m. p., 154, § 13, sub. 4, applies. This says that each house has the power to punish as a contempt and by imprisonment as a breach of its privileges the refusing to be examined as a witness before a committee, &c. It has already been said that the privileges in question do not necessarily belong to legislative bodies. Whatever authority those bodies have comes from the constitution. If the constitution, fairly construed, gives them authority to enact a law of this kind, then the law is valid, otherwise not. 4 Hill, 140; 6 N. Y., 363. The nature of a proceeding to punish for a contempt is clearly judicial. It includes deciding whether the act has been committed, whether the inquiry was material and the determination of the punishment. We cannot think that the legislature can confer upon itself judicial authority to try, convict and punish. Such power would not be wise. There is no impartial tribunal. The senate prosecutes the inquiry, it decides the question to be proper, it refuses the witness counsel, it sends him to jail.

It is proper that the rights of the prisoner in a case like this should be considered on habeas corpus. He should not be remanded under Code Civ. Pro., § 2032, sub. 3. Where a prisoner

is committed by *courts* he has his remedy by certiorari on appeal. But if we cannot examine here whether he should have answered the questions then the witness is deprived of all benefit of the writ of habeas corpus. Const., art. 1, § 4. He is entitled to a judicial decision. 9 Ad. & E., 1; 56 N. Y., 182; Const., art. 1, § 1.

The questions asked were not pertinent. The coal business was not in any way connected with the alleged irregularities, nor should the committee have inquired as to the persons witness employed. Witness was not himself an officer or employee of the department. Nor need the witness tell where he got his limestone chips. Nothing shows that they were the property of the city before witness delivered them. And if not, where he got them was strictly his own business.

We think witness was entitled, in an orderly manner, to take advice of counsel as to whether he should answer the questions put. 3 Edw. Ch., 458. The committee had formally ruled that witnesses must answer all questions which did not criminate them and that of that the committee were to be the judges. Thus they had ruled that questions must be answered although they were immaterial and might degrade the witness. 72 N. Y., 571. The committee had counsel; the questions might have seriously affected witness in his business.

Order reversed and witness discharged.

Vol. 19—No. 9a.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## CORPORATIONS.

N. Y. CITY COURT. GENERAL TERM.

Charles Kruse, *applt.*, v. William W. Dusenbury et al., *respts.*

Decided April 12, 1884.

A plaintiff is not estopped by the fact that he has introduced in evidence defendant's certificate of incorporation from showing that the subsequent steps necessary to perfect such incorporation had not been taken.

If a manufacturing corporation created under the laws of New Jersey has no office or place of business in that state and opens an office and transacts business in the city of New York, the incorporators are personally liable for all debts contracted in the corporate name.

Appeal from a judgment entered upon the dismissal of the plaintiff's complaint.

Action to recover for coffee urns manufactured for and delivered to "The Grant New Process Coffee Co.," composed of defendants, whose office was at No. 266 Broadway, N. Y. City.

The complaint charges that defendants are partners. The answer denies the co-partnership charged, and alleges that the Grant New Process Coffee Co. was, at the times alleged in the complaint, a corporation duly organized under and by virtue of an act of the Legislature of New Jersey, passed April 7, 1875, and March 8, 1876.

Upon the trial the certificate of incorporation of the company was offered in evidence by the plaintiff.

From this certificate it appears "That the City of Plainfield in the County of Union, in the State of New Jersey, is the place where the business of the company is to be conducted." The amended certificate recites the same fact, with this addition, to wit,: "And the place out of this state (New Jersey) where the same is to be conducted is the City of New York, in the State of New York." It also recites that "The portion of the business of said company which is to be carried on out of the State (New Jersey) is the selling of the manufactured products of the said company and the granting and selling of licenses, rights and privileges under the patents owned by the said company." Plaintiff then offered to prove that the Grant New Process Co. never did business in New Jersey. This evidence was objected to and excluded. Plaintiff then offered to prove that the company never did business in Plainfield. This evidence was also objected to and excluded. Plaintiff next offered to show that the company had no valid existence in this State and had no power to engage in this transaction testified to. This evidence was also objected to and excluded. The court thereupon said to plaintiff's attorney, "As you have yourself offered in evidence the certificates of incorporation of that company, you cannot now question its corporate existence or authority to make contracts; you are estopped by having offered in evidence the certificates of incorporation."

*A. Walker Otis*, for applt.

*Ira D. Warren*, for respts.

*Held*, Error; that offering the certificates in evidence did not estop plaintiff from proving that the company had failed to take the subsequent steps necessary to the consummation of its corporate existence, and this is practically what plaintiff was endeavoring to show. If the Grant New Process Company had no office or place of business in Plainfield, and never did business in New Jersey, these facts, in view of its charter, which designates "Plainfield, New Jersey," as the principal place where its business was to be conducted, make it apparent that it was not an existing corporation within the meaning of the statute of New Jersey under which it purports to have been incorporated.

A corporation, in the nature of things, must have some fixed office or place of business in the State where it was incorporated, so that creditors may know where to find it, that they may present, and, if necessary, prosecute their just demands. The statute contemplates that such place of business shall exist not only in name but in fact, for if the corporation has no place of business in the State where it was incorporated it does not fit the charter, and it cannot have branch offices elsewhere. *Ang. & Ames on Corp.*, 10th Ed., §104.

That if, as plaintiff claims, the Grant New Process Co. never did business in New Jersey and had no office or place of business in Plainfield, it was a fraud upon the

laws of New Jersey and cannot screen defendants and its organizers from personal responsibility as partners for contracts made in New York under the assumed name. If there was no valid corporation according to the laws of New Jersey defendants are partners, because the name which they assumed represents them and no other legal entity. 1 Beas., 31; 7 Vroom, 250. The term partnership has been variously defined, but the relation is generally determined by a mutual participation in the profit and loss of some trade or business carried on by individuals in their name or under an assumed name for their benefit.

If the charter of the Grant New Process Coffee Company does not fit the business carried on by defendants under that title, and this is practically what plaintiff offered to prove, then the partnership relation just described becomes applicable with its concomitant liabilities.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *McAdam, C. J.*; *Hyatt and Browne, JJ.*, concur.

#### DEPOSITIONS. PARTNERSHIP.

N. Y. COMMON PLEAS. GENERAL TERM.

Sara Goldberg, *respt.*, v. George D. Roberts, *applt.*

Decided March 14, 1884.

Under the Code the plaintiff is entitled to an order for the examination of one of two

defendants to prove a copartnership between the latter.

Plaintiff was granted by the court below an order for the examination of the defendant appellant for the alleged purpose of proving a copartnership between the defendants, and that the defendant Morse acted by their authority when contracting with plaintiff for her services. The order was affirmed by the General Term of the City Court and an appeal taken to this Court.

*Clark Bell*, for applt.

*Walter M. Rosebault*, for respt.

*Held*, That the order should be affirmed. In this court the order has been held proper in any case where a bill of discovery would have been upheld in equity. 52 How. Pr., 701; 7 Daly, 238; 2 Abb., N. S., 146. Whether or not this restriction should be applied under the existing statute is questionable. 27 Supr. Ct., 48. The testimony sought must be material and necessary for the party making such application or the prosecution or defense of such action. Code Civ. Proc., § 872, subd. 4. In this case the fact of partnership between the defendants must be proved by plaintiff to make out her cause of action. It is material and necessary to the prosecution of her case, and her effort to establish it by the defendant's testimony does not indicate any desire or intent to discover what may be matter of defense. In my opinion a bill of discovery could have been maintained for the same object. It was well said by the learned Chief Justice: "In equity a party was

allowed to discover from his adversary any matter which was material to the establishment of his cause of action, \* \* and it was no answer to the application that the other party might be examined as a witness upon the trial, for the one filing the bill was not bound to call him as a witness on the trial, but might have a discovery previously from him as a party." 7 Daly, 238.

Order affirmed, with costs and disbursements.

Opinion by *Beach, J.*; *Daly, Ch. J.*, and *Larremore, J.*, concur.

### CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Hezekiah W. English, *respt.*, v. Charles J. Rumsey et al., exrs., *appls.*

Decided May, 1884.

Plaintiff being under indictment for poisoning stock of T., deposited money with R., a banker, M., his attorney, saying to R. that the money was to be paid to plaintiff or T., and that he would tell him to which one. The deposit was made upon an agreement between plaintiff and T. that if the indictment were nolle pros'd T. was to have the money, if not it was to be returned to plaintiff. Of this agreement R. never had any knowledge. The indictment was not nolle pros'd, and plaintiff was tried and acquitted. In an action by plaintiff against R.'s executors for the deposit, *Held*, That the agreement between plaintiff and T. was illegal, and that as plaintiff must show this agreement to establish his cause of action he could not recover.

Appeal from order confirming the report of a referee to whom a claim against the estate of John Rumsey, which was disputed, had

been referred. The facts were that plaintiff was indicted in September, 1881, for poisoning T.'s stock. After indictment found plaintiff and T., by advice of counsel, made this arrangement, with a view to settle the matter and at the same time not compound a felony. Plaintiff left with John Rumsey, a banker, \$200; no explanation was given or asked by him of the reason for depositing the money, but he was told by M., who, with E., was acting as attorney in the matter for plaintiff, in the presence of plaintiff and T., that he (Rumsey) was to pay the money to one of the men (i. e., plaintiff or T.), and that either M. or E. would tell him to which one he should pay it. Rumsey assented. The agreement between plaintiff and T., as a consequence of which the money was thus deposited, was that T. was to have the \$200 if the indictment was nolle pros'd, if not the money was to go back to plaintiff. Rumsey never knew of this agreement. The indictment was not nolle pros'd. Plaintiff was tried and acquitted. Among the papers of John Rumsey there was found, after his death, a strip of paper such as is put around bills, empty, with this endorsement: "\$200, Sept. 30, 1881, to be paid to T. when agreed to by E. and T. Left by M." Plaintiff presented a claim to the executors which was refused and this action brought. The referee reported in favor of plaintiff.

*George B. Davis*, for applt.

*M. N. Tompkins*, for respt.

*Held*, Error. Apart from the question of illegality plaintiff can-

not recover. Rumsey's estate can only be held to the agreement which he made. The statements vary somewhat as to what he agreed to. If Rumsey was to hold the money until M. told him to whom it was to be paid, then we may say that there is no proof M. ever told him to pay it to any one. If we take the memorandum, which is confirmed by E.'s testimony, then Rumsey took the money solely to pay it to T. when E. said so. On this theory plaintiff has no claim, and T. none until E. says so. For even if plaintiff and E. had agreed that in case the indictment was not *nolle pros'd* E. was to have the money back, still Rumsey knew nothing of this agreement, and his estate is not to perform what he did not promise.

But the agreement is illegal. Its purpose was to compound a felony. The cases cited by plaintiff, 4 Keyes, 208, and 43 N. Y., 273, are those where the illegal agreement had been performed, and where it was not necessary to resort to the agreement to prove plaintiff entitled to the money. Here, when the money was deposited with Rumsey, the illegal agreement had not been performed and the deposit was to secure its future performance, and as between plaintiff and E. the right to this money did depend upon the agreement, and to recover plaintiff would have to show it. The test is whether plaintiff will require any aid from the illegal transaction to establish his case. Chitty on Cont. 657 ; 9 N. Y., 320 ; 63 Barb., 395. Plaintiff, here, waits until it is decided

that the indictment will not be *nolle pros'd* to begin his action. Therefore he does not disaffirm an illegal contract and seek to recover back, but his action depends on the contract.

Judgment reversed, new trial granted, referee discharged, costs to abide event.

Opinion by *Learned, P. J.* ; *Bockes, J.*, concurs ; *Boardman, J.*, not acting.

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CRIMINAL LAW. ASSAULT.  
N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

The People *ex rel.* Henry Devoe,  
*applt.*, v. John Kelley, Sheriff,  
*respt.*

Decided May, 1884.

Where the sentence of a prisoner is alleged to be incorrect the remedy is by appeal from the judgment and not by writ of habeas corpus. Upon such appeal the appellate court can correct the sentence if erroneous.

*It seems*, That for an assault in the third degree the prisoner cannot be imprisoned in a State prison but must be sent to a penitentiary or county jail.

Relator was indicted in 1883 for assault in the second degree, was convicted of assault in the third degree and sentenced to one year in Auburn State Prison. Relator contended that the sentence should have named a penitentiary or county jail. He obtained a writ of habeas corpus, upon which the county judge made an order dismissing the writ and remanding the relator.

*Lynes & Pierce*, for *applt.*  
*C. L. Barber*, for *respt.*



*Held*, That the order was proper. Relator has a remedy by appeal from the judgment, Code Crim. Pro., §§ 515 and 543, and the appellate court can thereupon correct the judgment, if erroneous. The writ of habeas corpus and the provisions concerning it under the Code of Civil Procedure, § 2016, are substantially the same as they were under the Revised Statutes, pt. 3, ch. 9, tit. 1, art. 2, § 22, subdiv. 2, m. p., 563. Section 2016, *supra*, provides that a person is not entitled to the writ where he is detained by the final judgment of a competent tribunal of criminal jurisdiction, and by § 2033, Code Civ. Pro., the judge, upon the return of the writ, shall not inquire into the legality or justice of the judgment. The sentence was not void. The Tweed case, 60 N. Y., 570, as limited and explained in 66 N. Y., 10, does not apply. It only holds that where a court has imposed a sentence to the full limit allowed it has exhausted its authority, and after the prisoner has served the term authorized by statute he is entitled to discharge on habeas corpus. Here the prisoner has served no term at all. A sentence would be void and the prisoner entitled to discharge on habeas corpus where the sentence was one which the court *upon no facts whatever could impose*. But the present sentence is one which upon proper facts might be imposed. We think therefore the county judge was right in treating the judgment as not void and in remanding the prisoner under Code Civ. Pro., § 2032, subdiv. 2.

In this view, the question whether the sentence was right is not before us, but as it has been argued we will say that, upon consideration of all the provisions of the Penal Code, which are somewhat conflicting, we are of opinion that imprisonment for assault in the third degree must be in a penitentiary or a county jail and that the sentence here to a State prison was wrong.

Order affirmed.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs.

#### REFERENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Erastus H. Benn, *respt.*, v. The First National Bank of Elmira, *applt.*

Decided May, 1884.

Plaintiff, an attorney, rendered services in one action during six years, and the items of his account, including disbursements, were sixty in number. The answer set up various payments to him during a long period. *Held*, That the action was not one which, within the meaning of the Code, would require the examination of a long account on either side, and that a compulsory reference was improper.

This action by an attorney, for services, was referred against defendant's objection. The services were rendered in one action during about six years, the amount of the charges being some \$4,300, and of conceded (by plaintiff) payments \$1,100. The services, including disbursements, consisted of some sixty items. The answer set up payment as a defence, also various

payments and two counter-claims; one of \$1,143, "advanced to plaintiff, from time to time" during four years. This appears to be the payment which plaintiff admits. Defendant appeals from the order of reference.

*McGuire & Taber*, for applts.

*E. H. Benn*, in person, for respt.

*Held*, That a compulsory reference was improper. It is not a case which involves the examination of a long account within the meaning of the statute. There was only a single retainer. The services were rendered at different times, as they usually are, but they constitute really but one claim on one contract. The matters set up in the answer showing money advanced to plaintiff are only payments on the alleged indebtedness.

Order reversed and motion denied, each with \$10 costs.

Mem. by *Learned, J.*; *Boardman* and *Bockes, JJ.*, concur.

### INJUNCTION.

N.Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The West Troy Water Works Co., *respt.*, v. The Village of Green Island, *applt.*

Decided May, 1884.

Plaintiff was organized under the general act, Ch. 737 of 1873, to furnish water, &c., and did furnish water to defendant for several years. That act gave plaintiff power to lay pipes in defendant's streets. A disagreement arose as to the price at which water should be had, and plaintiff obtained an injunction restraining defendant from using water from the hydrants for any purpose.

*Held*, Error; that plaintiff owed the public a duty to perform the purposes for which it was organized; that equity would not interfere to deprive defendant of all protection against fire in order that plaintiff might be compensated.

Plaintiff is organized under Ch. 737, Laws of 1873, relative to water works companies in towns and villages, and under the act the company is authorized to supply "at such rates and costs to consumers as they shall agree upon." Under § 4 the company may lay pipes in the streets of any town or village adjoining the supply town or village. Green Island adjoins West Troy, and is in the same town. After supplying water for several years a disagreement arose between the parties as to price, and plaintiff obtained a temporary injunction restraining defendant from using water from the hydrants in Green Island.

*J. R. Torrance* and *H. A. King*, for applts.

*William Hollands* and *Esek Cowen*, for respt.

*Held*, That the injunction should be vacated. Plaintiff owes a duty to the public because of the privileges which it enjoys to lay pipes in the streets, and the like. It should perform the purposes for which it was organized. We are not prepared to say that they could refuse to supply water except at their own price. If they have such a right it might be very inequitable that it should be exercised, and equity would not aid it.

No argument is needed to show that there is no irreparable injury to plaintiff. It has for several

years supplied the village and can do so now. The question is only one of price. [It appears that the parties differ \$500.]

Public interest demands that the injunction shall not stand. The protection of the village from fire is so important that equity ought not to interfere summarily with this protection, even though plaintiffs may have some difficulty and delay in obtaining the compensation which they claim. The village has relied upon this arrangement and it would be improper that equity should suddenly break it up.

We say nothing as to what may be just between the parties upon a final hearing. The above remarks are directed to the preliminary injunction.

Injunction order reversed, with \$10 costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

### CERTIORARI. PRACTICE.

#### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. John S. Burhans et al., Supervisors, v. The Board of Supervisors of Ulster Co.

Decided May, 1884.

A writ of certiorari can be granted only at a General or Special Term of the Supreme Court.

When the order granting the writ shows, by its heading, that the writ was regularly granted at a Special Term, at a time and place where a Special Term for hearing *ex parte* motions, &c., might have been held, and that it was allowed by one of the jus-

tices of the court, this should be held conclusive on a motion to quash.

Motion to quash a writ of certiorari.

The objection was taken that the writ was not granted at a General or Special Term of the court. The moving affidavits induced an inference that the writ was not granted in court; but the record showed it to have been regularly granted at Special Term at a time and place where a Special Term for hearing *ex parte* motions and applications might have been held. And the order granting the writ showed this by its heading, and it purported also to have been allowed by one of the justices of this court.

*Alton B. Parker*, for respts.

*John J. Linson*, for relators.

*Held*, That this should be deemed conclusive on a motion to quash the writ, unless contradicted by positive and irrefragable proof to the contrary.

It was urged that the order allowing the writ was defective, in that it stayed the execution of the determination complained of. The stay was, as the Code permits, "by separate order;" that is, by order separate from the writ (§ 2131.)

*Held*, That there was a compliance with the Code in this respect, and the objection was untenable.

Motion denied, with \$10 costs and disbursements for printing.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

## GUARDIANS. SURROGATES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Joseph Andrade et al., admsrs.,  
*appls.*, v. Samuel M. Cohen, admr.,  
 et al., *respts.*

Decided March 7, 1884.

Under Chap. 359, Laws of 1870, the Surrogate had power, after the death of a general guardian, to vacate a previous decree settling his accounts; and the administrator of such general guardian is a necessary and proper party to proceedings to vacate such decree.

The Surrogate has no power under 3 R. S., 6th Ed., 171, Secs. 32-37, after vacating a previous decree settling the accounts of a general guardian, to decree that the estate of the said guardian, he having died in the meantime, was indebted to his wards in a certain amount, and to order his administrator to pay such amount, and in default thereof that his sureties should be prosecuted on their bond.

Appeal from an order and decree of the Surrogate of N. Y. Co. made July 21, 1880, vacating a preceding decree settling the accounts of B. as general guardian and decreeing the payment by his administratrix, he having died in the meantime, of an amount adjudged to be due and owing from her intestate as general guardian to his wards, and in default thereof that her sureties should be prosecuted on their bond.

*A. R. Dyett* and *Charles Edward Souther*, for *appls.*

*Albert Cardozo*, for *respts.*

*Held*, That the Surrogate, under Chap. 359 of the Laws of 1870, § 1, had power to vacate the decree settling the accounts of B. as general guardian, and that he was jus-

Vol. 19—No. 9b.

tified in doing so by the evidence of fraud on the part of such guardian in making his accounts on which said decree was based.

That since the application to vacate said decree might result in maintaining a claim against the estate of the deceased guardian, his administratrix was the proper party to be brought before the Surrogate to protect its interests.

That the latter part of the decree appealed from was unauthorized, for the statute, 3 R. S., 6 Ed., 171, §§ 32-37, simply empowered the Surrogate to require and take an accounting of the guardian himself, and neither expressly nor by implication was the power given him to settle the accounts of a deceased guardian by a proceeding taken before him against his administratrix. 19 Barb., 30.

Decree reversed so far as it directed payment of the indebtedness by the administratrix of B. and in default thereof that her sureties should be prosecuted on their bonds, and otherwise affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady J.*, concur.

## EVIDENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Kate E. Hilsley, *respt.*, v.  
 George E. Palmer et al., *exrs.*,  
*appls.*

Decided May, 1884.

A party who cross-examines a witness on a collateral and immaterial issue is bound by

the answer of the witness and cannot afterwards call witnesses to contradict him on such collateral and immaterial issue.

The issue in this case was the genuineness of a \$10,000 note, alleged by plaintiff to have been given her for a consideration by defendants' testator. Defendants claim that the signature of their testator to said instrument was forged. This issue was tried before a referee appointed by the Surrogate, who found the signature genuine. Upon his report judgment was entered for plaintiff for the amount of the note.

Defendants appealed from such judgment.

One O'Neil was called by defendants and examined as an expert. On his cross-examination by plaintiff he was shown thirty-three signatures, numbered from 1 to 33, in a book and asked to say which of them was Lampson's (testator's) genuine signature and which was counterfeit, if any. Defendants objected to such evidence as incompetent and immaterial; that the evidence was collateral and not proper as a basis of future contradiction, &c. The objection was overruled and witness designated certain signatures as genuine and could not say as to others, though he thought they were not.

Afterwards W., a witness for plaintiff, was recalled and shown the same thirty-three signatures about which O'Neil had testified. W. then swore that some of the signatures pronounced genuine by O'Neil were written by him, W. To this evidence defendants ob-

jected that such evidence was incompetent and immaterial to contradict O'Neil upon a collateral issue and plaintiff was bound by O'Neil's answer; that it did not contradict O'Neil, who did not claim to be able to pick out the real from the false signatures; that the signatures were not in evidence. The objection was overruled and exceptions were duly taken.

*S. L. & F. M. Mayham*, for resp't.

*Krum & Grant*, for appl'ts.

*Held*, Error. It is plain that the signatures were prepared for the sole purpose of testing the skill of witnesses. O'Neil's attention was called to them in the belief that he would not be able to pick out the genuine from the false. He expressed his opinion. The evidence of W. did not contradict him. It showed his opinion was in some respects inaccurate. But how was it material whether these thirty-three signatures were genuine or not? The issue was as to the signature of the note. Whether O'Neil was right or wrong as to the thirty-three signatures, it did not aid in determining the real issue. It was a collateral issue; his answer was conclusive upon plaintiff and she could not afterwards call witnesses to contradict him on that collateral and immaterial issue. 14 N. Y., 439; 44 N. Y., 514; 1 Green. Ev., § 580; 2 Tayl. on Ev., §§ 1434, 1435, 1438-9; 7 East, 108; 1 Cow. & Hill, 72.

The Act of 1880, Ch. 36, does not affect the principles already

stated or change the rule as laid down in the cases cited.

The thirty-three signatures were not in evidence, nor offered in evidence. They were not all genuine. They were not to be compared with the original disputed signature. No such purpose as is provided for by that act was contemplated by plaintiff when this evidence was called out. It was evidently done for the sole purpose of contradiction and for that purpose it was improper.

Judgment reversed, referee discharged and new trial granted, costs to abide the event.

Opinion by *Boardman, J.; Learned, P. J., and Bockes, J.,* concur.

### STOCKS. DIVIDENDS.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edward Ellsworth, exr., *plff.*,  
v. N. Y., L. E. & W. RR. Co.,  
*deflt.*

Decided March 7, 1884.

On April 28, 1878, the N. Y., L. E. & W. RR. Co. purchased the property and franchises of the Erie R. Co. in pursuance to a plan or agreement of purchase in which it was provided, among other things, that the N. Y. L. E. & W. R. Co. should create preferred stock to an amount equal to the preferred stock of the Erie RR. Co. and that preferred stock of the latter company, in respect of which \$3 in gold for each share had been paid, might be exchanged for an equal amount of the preferred stock of the former company. On February 27, 1878, the plaintiff who was the owner, as executor, of 100 shares of the preferred stock of the Erie RR. Co., paid \$3 in gold on each of said shares and procured the evidence of such payment to be stamped upon his cer-

tificate of stock. On Nov. 29, 1881, the directors of the N. Y., L. E. & W. RR. Co. passed a resolution that the books of said company should be closed on the 31st Dec., 1881, and that a dividend was declared upon the preferred stock, which should be paid on and after Jan. 16, 1882, to the preferred stockholders registered as such at the closing of the books. Plaintiff did not surrender his certificate of stock of the Erie RR. Co. and receive a certificate of stock of the N. Y., L. E. & W. RR. Co. until January 17, 1882, when he demanded the dividend, which was refused. *Held*, That he was entitled to the dividend.

Case agreed upon and submitted under \$1279.

On April 28, 1878, The N. Y., L. E. & W. RR. Co. purchased the property and franchises of the Erie R. Co. in pursuance to a plan or agreement of purchase in which it was provided, among other things, that the N. Y., L. E. & W. RR. Co. should create preferred stock to an amount equal to the preferred stock of the Erie R. Co., and that preferred stock of the latter company, in respect of which \$3 in gold for each share had been paid, might be exchanged for an equal amount of the preferred stock of the N. Y., L. E. & W. RR. Co. so created. Defendant's testator was the owner, at the time of his death, of 100 shares of the preferred stock of the Erie R. Co. and on Feb. 27, 1878, plaintiff, as his executor, paid \$3 in gold on each of said shares to the Farmers' Loan & Trust Co., and a receipt therefor was stamped upon his certificate of stock, but he did not at that time surrender such certificate with the evidence of such payment and receive a certificate of an equal

amount of stock in the N. Y., L. E. & W. RR. Co. On Nov. 29, 1881, the directors of the N. Y., L. E. & W. RR. Co. passed a resolution that the books of the company should be closed on Dec. 31, 1881, and remain closed until Jan. 17, 1882, and that a dividend was declared upon the preferred stock, which should be paid on and after Jan. 16, 1882, to the preferred stockholders registered as such at the time of closing the books. On Jan. 17, 1882, plaintiff surrendered his certificate of stock in the Erie R. Co. and procured a certificate of an equal amount in the N. Y., L. E. & W. RR. Co., and, thereupon, demanded payment of the dividend thereon, which was refused.

*Smith & Lawrence*, for plff.

*W. D. Shipman*, for deft.

*Held*, That it must be assumed that defendant had performed its obligation to create the preferred stock provided for by the agreement, and thereupon the stock so created went into defendant's treasury to be disposed of according to such agreement. That upon the payment by plaintiff of \$3 on each share of the stock of the Erie R. Co. owned by him he became the owner of an equal amount of of the existing stock of defendant, which defendant held in trust for him until he should surrender his old certificate and receive a new one.

That the dividend was declared upon the *whole* of the preferred stock, and the dividend when declared belonged to the stock.

That the right of payment to a particular claimant depended, under the declaration and notice, upon his production of certain evidence of his right to receive the payment, and, failing in that, he could not demand payment under the notice, but, if the stock existed, the dividend would remain subject to the establishment in some other form of his legal or equitable right to receive the payment, and that when plaintiff, therefore, had surrendered his old certificate and had received a new one he was entitled to payment of the dividend.

Judgment ordered for plaintiff.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### DIVORCE. PLEADING.

N.Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edith Allen, *applt.*, v. Vanderbilt Allen, *respt.*

Decided March 7, 1884.

Charges of adultery on the part of the defendant have no place in a complaint which prays for a decree of separation and will be stricken out on motion.

Allegations in such a complaint of frequent intoxication and of filthy habits on the part of defendant are appropriate to the charge of cruel and inhuman treatment and will not be stricken out.

An allegation in such a complaint that defendant had appropriated about \$3,000 worth of property belonging to plaintiff and refuses to return it is appropriate to the question of the amount of alimony and will not be stricken out.

The court will not strike out from a pleading, on a motion for that purpose, facts alleged that can in any form or relation be material to be proved on the trial.

Appeal from an order striking out certain allegations from the complaint.

The complaint in this action prayed for a decree of separation from bed and board and alleged as the grounds for such decree cruel and inhuman treatment, abandonment and neglect of plaintiff on the part of defendant.

Among other things the complaint contained allegations of adultery on the part of defendant; that he was addicted to filthy habits which endangered plaintiff's health; that he frequently came home late at night in a state of gross intoxication and while in such condition snored so that plaintiff could not sleep and his breath so poisoned the atmosphere as to render plaintiff sick and to nauseate her and otherwise impair her health, and that defendant had appropriated about \$3,000 worth of property belonging to plaintiff and refused to restore the same to her.

Defendant moved to strike out the above allegations as irrelevant, redundant, and scandalous, and such motion was granted.

*Ira Shafer*, for applt.

*Robert Sewell*, for respt.

*Held*, That while the allegations of adultery would be very proper in an action to obtain a divorce *a vinculo*, they have no place in an action for separation and were properly stricken out.

That the other parts of the complaint which were stricken out should have been allowed to remain. That the allegations of intoxication and of the filthy habits

of the defendant were appropriate to the charge of cruel and inhuman treatment, and the allegations of the appropriation of the property of the plaintiff by the defendant and his refusal to return it were appropriate on the question of the amount of alimony.

That the court will not strike out on such a motion facts alleged that can in any form or relation be material to be proved on the trial.

Order modified accordingly.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

## TAXATION. CORPORATIONS.

### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respts.*, v. The Gold & Stock Telegraph Co., *applt.*

Decided May, 1884.

Chap. 361, Laws of 1881, established a new system of taxation for corporations in this State, laying a tax for State purposes upon the franchise and no longer upon the capital.

This statute, however, does not apply to town and county taxes. It governs the rate of taxation for State purposes upon telegraph companies whose lines are built partly within and partly without the State, and Ch. 481, Laws of 1853, although repealed, must be deemed abrogated thereby. The statute makes it obligatory upon a corporation to pay the State tax within a certain period, and if not paid the State may recover interest thereon from the time when the tax should have been paid. The penalty fixed for non-payment is not in lieu of interest.

This action was brought to recover a tax alleged to be due under § 3, Ch. 361, Laws of 1881. The capital of defendant was \$5,000,000,



its rate of dividend was six per cent., but the cost to it of its work within this State was only \$146,371.22. The defense claim that Ch. 481, Laws of 1853, is still in force, and that it is only upon the smaller sum that the tax should be computed. The court held that plaintiff was entitled to recover one-quarter mill upon the capital stock for each one per cent. of dividend, or \$7,500, also ten per cent. thereon as a penalty for non-payment within the statutory period, also interest from the time payment should have been made.

*Matthew Hale and Wager Swayne*, for applt.

*D. O'Brien*, for the People.

*Held*, That the statute of 1853 had no application. The law of 1880, as amended in 1881, established as to the State tax a new system, a tax upon franchise; and under it capital, except so much as may be invested in real estate, is exempt from State tax. Under the Revised Statutes, on the contrary, see Chap. 654, Laws of 1853, corporations were taxed upon their capital surplus. And Ch. 471, Laws of 1853, modified this general law in favor of telegraph companies so that they should only be taxed on their cost in this State. Poles and wires might have been considered real estate in other States and have been taxed there. This may have induced the Legislature to pass Chap. 471 and such legislation would have been in the line of action taken by the State in such matters, 1 R. S., m. p. 389, § 6, i. e. to have real estate of a corpora-

tion taxed in the town where it lies. But, as said above, the statutes of 1880 and 1881 introduced a new system and these later statutes concededly apply to telegraph companies.

Interest was properly allowed. The statute, § 4, Ch. 361, Laws of 1881, imposes upon a corporation the obligation to pay within a certain time and upon failure interest should begin to run. Interest is not recovered upon the penalty and we do not think the penalty takes the place of or deprives the State of the interest.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## CONSTITUTIONAL LAW. FALSE IMPRISONMENT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Robert Bocoek, respt.*, v. *William Cochran, applt.*

Decided May, 1884.

Chapter 260, Laws of 1867, § 15, granting to the Police Justice of the village of Cox-sackie "jurisdiction of all criminal cases the same as is now possessed by justices of the peace of towns" is constitutional; and under it the jurisdiction of the magistrate does not extend beyond the village limits.

Where two constructions of a statute are possible, that one should prevail which will uphold the statute rather than one which will condemn it.

Where a physician was arrested, taken before a magistrate and confined in jail about an hour, *Held*, In an action against said magistrate for false imprisonment, that a verdict of \$950 was excessive.

In issuing a warrant upon a sworn complaint and in deciding upon the sufficiency of

said facts the magistrate acts judicially, and is not liable to a civil action because the facts were insufficient.

Action for false imprisonment against defendant, acting as Police Justice of the village of Coxsackie. Defendant issued a warrant for plaintiff's arrest for assault and battery upon a sworn complaint alleged to be defective because it did not state where the assault was committed. The warrant recited that it was committed in the village. Plaintiff was arrested about 10 A. M. on Saturday and walked with the constable to defendant's office. An adjournment was taken to Monday; after adjournment on Saturday the constable, not as far as appears by defendant's direction, took plaintiff to the lockup and kept him there an hour; he was then released. On Monday he was tried and acquitted. Plaintiff had a verdict of \$950. Plaintiff was a doctor and also at times a preacher.

*Griswold & Crowell*, for applt.

*G. R. Adams*, for respt.

*Held*, That, considering the action was against a magistrate, acting in the apparent discharge of his duty, the damages were excessive.

It is also said that because of the defect in the complaint the magistrate acquired no jurisdiction and is liable in this action. We think, however, that his action in issuing the warrant was judicial. The protection of a magistrate who acts judicially is most important. 73 N. Y., 12; 58 Barb., 61; 12 Hun, 204; 2 Abb., 469. Here certain facts were sworn to.

Admit that the facts were insufficient; still the magistrate acting judicially held them sufficient; and for his mistake he is not liable in this action.

A further question is the constitutionality of a provision in the act incorporating Coxsackie. Laws of 1867, Ch. 260. Section 2 provides for a police justice and § 15 says "he shall have jurisdiction of all criminal cases the same as is now possessed by justices of the peace of towns." It is claimed that this is in violation of art. 6, § 19 of the constitution, which says, "Inferior local courts of civil and criminal jurisdiction may be established by the Legislature." This provision of the constitution is deemed to forbid, by implication, the establishment of a court not limited in jurisdiction to the locality in which it may be created. Defendant says that the provision of the Coxsackie charter above cited gives the police justice the power of justices of peace in the whole county and not simply in the village. It was held, in a similar question in *Geraty v. Reid*, 78 N. Y., 64, that as between two constructions of a statute that is to prevail which will uphold a statute rather than that construction which will condemn it. Upon examination of the whole act we think it constitutional and that it is intended to limit the jurisdiction of the police justice to the village. The words "the same as is now possessed, &c.," are descriptive of the kind and class of jurisdiction, not of its local extent. The act limits the powers of the police

justice and takes from him powers which justices of the peace have. Thus he is not to serve as auditor or have any appointing power. The 18th, 19th and 23d sections give special powers to the police justice which are plainly local. The 41st section also specifies that fines, &c., are to be paid to the treasurer.

Judgment reversed for excessive damages and for error in law, and new trial granted, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman* and *Boeckes, JJ.*, concur.

### FRAUDULENT CONVEYANCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Eva M. Briggs et al., applts., v. Jennie B. Van Buren et al., respts.*

Decided May, 1884.

Only a judgment creditor after execution returned unsatisfied can bring an action to have a conveyance set aside because made without a valuable consideration.

Mrs. B. deeded premises without consideration to the defendant J. B., her daughter. Afterwards Mrs. B. mortgaged the same premises to her other children as alleged to secure them for moneys belonging to them received by her as guardian and expended for her own use. The mortgages were foreclosed and the mortgagees bought. No accounting between Mrs. B. as guardian and the other children has ever been had, and whether she is indebted to them does not appear definitely. In an action by the children to set aside the deed from Mrs. B. to J. B. as fraudulent and void as to them, *Held*, That the suit could not be maintained.

The action was brought to have a deed declared fraudulent and void. The defendant Van Buren is a child of Mary A. Briggs by her first husband, one Denike. Plaintiffs are her children by her second husband, George Briggs. He died in 1869. He left some personal property to his children. This was turned into money and deposited in a bank by Mary A. Briggs. The latter owned the premises in question. In 1872 she deeded them to the defendant Jennie Van Buren for one dollar. A few months after Jennie, then a minor, deeded them back to her mother at her request. After Jennie reached majority she disaffirmed this reconveyance; it was never recorded. In 1873, 1874 and 1878 Mary A. Briggs executed to plaintiffs three several mortgages. Their consideration is alleged to have been the money above stated to have been left by George Briggs to his children, which money Mary A. Briggs, their guardian, had drawn out and used. In 1881 these mortgages (without bonds) were foreclosed and plaintiffs bought the premises. No judgment for a deficiency against nor any personal liability of Mrs. Briggs upon said foreclosure is shown. Mrs. Briggs has been in possession since the death of her first husband. The referee found for defendant.

*M. Schoonmaker*, for applt.

*John E. Van Elten*, for respt.

*Held*, That the action could not be maintained. Plaintiffs do not sue as creditors or judgment creditors of Mrs. Briggs. They have no

judgment. If they have a claim against her for misappropriating their money they must bring her to an accounting and obtain a decree against her before they can attack her conveyances as fraudulent as to them. Plaintiffs are certainly in no better position than Mrs. Briggs would be, if she were plaintiff.

Plaintiffs assert that the conveyance was voluntary and therefore void as to them. 2 R. S., m. p., 137, § 1. But plaintiffs are not judgment creditors of Mrs. B., and from the evidence we do not think they can ever recover a judgment against her. She may and probably has spent the money as guardian for their support.

If they stand simply as her subsequent grantees, they cannot question the conveyance on the ground that it was voluntary. Further, it appears from the bank book that up to the time when she deeded to Jennie Van Buren she had drawn nothing from plaintiffs' funds in bank, so that at that time plaintiffs were not creditors of Mrs. B.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## EVIDENCE.

### N. Y. COURT OF APPEALS.

The People, *respls.*, v. Jefferson, *applt.*

Decided June 3, 1884.

On a trial for murder where the defence was insanity certain papers showing the prison-

er's motives for the crime were introduced in evidence. It was proved that these papers were found on the prisoner's person when arrested, and that he declared that he wrote them for the purpose of having them found in case he was arrested. *Held*, An abundant identification of the papers.

Defendant was convicted of the crime of murder in the first degree. He claims that the killing was unpremeditated, and that he was not of sound mind when he discharged the gun by which the killing was effected. The evidence as to defendant's unsoundness of mind at the time of the commission of the crime was of a slight and inconclusive character. The only exception urged is one as to the admission in evidence of certain papers found on defendant's person when he was arrested, two days after the commission of the homicide, one of which was apparently signed by defendant. They all appeared to be monologues, written by defendant and purporting to contain a record of the thoughts, feelings and motives operating upon his mind to induce the commission of the contemplated crime. No ground of objection was stated by the prisoner's counsel to the admission of the papers in evidence, and the only ground now urged in support of the objection is the want of identification of the papers offered, and the immateriality and irrelevancy to the offense charged in the indictment of certain portions of the statements contained in them. It was proved that these papers were found on defendant's person when arrested, and that he frequently declared that he wrote them for the purpose

of having them found there in the event of his being arrested for the crime. The court, in its charge, excluded from the consideration of the jury all parts of the papers referred to that did not tend to indicate an intention on the part of the defendant to kill the deceased at the time the crime was committed. No request was made by the prisoner's counsel to charge in respect to said papers, and no exception taken to any part of the charge in relation thereto.

*George F. Elliott*, for applt.

*Almet F. Jenks*, for respt.

*Held*, That the evidence showed an abundant identification of the papers referred to; no error was committed by the court in its charge in reference thereto.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

## WILLS.

### N. Y. COURT OF APPEALS.

*Hobson et al., exrs., v. Hale et al., respts., impled. with Hale et al., appls.*

Decided April 29, 1884.

A will made in Massachusetts and valid under the laws of that state provided for twelve life annuities and then directed that the residue should remain in the hands of the executors well and safely invested until the death of the last annuitant, to be then divided as directed with the accumulations. It contained no express direction for a conversion of the real estate into personalty. *Held*, That there was not an equitable conversion of the real estate, and that the direction as to the residue was invalid as to the real estate in this state as it was repug-

nant to the statutes of perpetuities and as to accumulations.  
Affirming S. C., 17 W. Dig., 235.

This action was brought to obtain a construction of the will of H., who died at his residence in Massachusetts, where his will was executed, June 4, 1881. H. at that time owned valuable real estate in the city of New York. The larger part of his estate was in Massachusetts, where his will was proved and his executors resided. The will was valid under the laws of that state. The testator provided for twelve different life annuities, payable in most instances quarterly "until the final division of the rest and residue of my estate as hereinafter provided." The will then provides, "Article 22d, As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested until the decease of the last survivor of the life annuitants named in my foregoing will, and that then the said residue and remainder, with all the accumulated interest thereof, shall be divided equally among my grandchildren *per stirpes*, to hold to such grandchildren so distributed, and to their heirs, executors, administrators and assigns forever." The will on its face contains no direction for a conversion of the real estate into personalty.

*Theodore W. Dwight*, for appls.

*Joseph H. Choate*, for respts.

*Held*, That under the provisions of the will there was not an equitable conversion of the real estate in this state into personalty from the time of the death of the testator. The language employed in the 22d Article vests the executors with a power of a general character over the estate which shall be in their hands at any time. The use of the words "to be and remain \* \* \* well and safely invested," in connection with the others employed, must be regarded as referring to the condition of the testator's estate as it existed at the time of his death. The fact that no provision was made specifically in regard to the rents and profits, while it evinces a want of exactness in the draftsman, does not show that the intention existed to convert the real estate into personalty. The words "divided equally" are alike applicable to real and personal property and may be appropriately used in reference to both.

While equitable conversion may take place by implication as well as by the express words of the will, to uphold a conversion of real estate into personalty there must be such an implication of the testator's design as to leave no question in regard to the same; the language employed must show a plain and clear intention to that effect. 46 N. Y., 144, 162; 26 Barb., 204; 7 N. Y., 242; 58 Pa. St., 433; 1 Jarm. on Wills (5th Ed.) 584; Hoff. Ch., \*202, \*208; 4 Mad. Ch., 260.

*Mower v. Orr*, 7 Hare, 473;

*Cookson v. Reay*, 5 Beav., 22; *Earlom v. Saunders*, Ambler, 241; *Cowly v. Harstonge*, 1 Dow., 361; *Hereford v. Ravenhill*, 5 Beav., 55; *Burrell v. Baskerfield*, 11 Beav., 525; *Power v. Cassidy*, 79 N. Y., 602; *Lent v. Howard*, 89 N. Y., 169; *Gourley v. Campbell*, 66 N. Y., 169, distinguished.

*Also held*, That Article 22 of the will was invalid so far as it affects the real estate situated in this state, as it suspends the absolute power of alienation beyond the time limited by the Revised Statutes. 1 R. S., 723, §§ 14, 15; 14 Wend., 265; 16 id., 62; 7 N. Y., 556; 11 Hun, 147; 72 N. Y., 603, 556. No future estate arises until the termination of the life of the last of the twelve annuitants, and it only then becomes a vested interest. 67 N. Y., 348, 29 id., 40; 76 id., 136; 88 id., 92.

A trust otherwise void as suspending the power of alienation for more than two lives in being is not made valid because of there being given to the trustee power to sell the property, the proceeds remaining subject to the execution of the trust. 11 Hun, 147; 72 N. Y., 603.

*Also held*, That Article 22 of the will is repugnant to the provision of the Revised Statutes which prohibits accumulations except for the times and purposes therein permitted. 1 R. S., 726, §§ 37, 38.

Judgment of General Term, affirming judgment of Special Term, affirmed.

Opinion by *Miller, J.* All concur.

# WILLS. PROBATE. EVIDENCE.

N. Y. COURT OF APPEALS.

*In re* probate will of Smith.

Decided April 15, 1884.

While the mere fact that a legatee was the attorney of testatrix creates no presumption against the validity of the legacy, yet that fact taken in connection with a change of testamentary intention, great age of testatrix, that the will was executed during her last sickness, and without independent advice, and that the attorney was the draftsman and took an active part in procuring the execution of the will, makes a case which imposes the burden upon him of satisfying the court that the will was the free and intelligent expression of testatrix' wishes and intention.

Evidence of the attorney in such a case as to the contents of other wills of testatrix drawn by him, and as to the circumstances attending the making thereof, is incompetent under § 829 of the Code as against a contestant who claims as legatee under a former will.

Under the last clause of § 2545, it is the duty of the appellate court, on finding that incompetent evidence was admitted, or competent evidence rejected, to determine whether the error prejudiced the party against whom it was committed, and if such evidence was important and material, and if the court cannot say that notwithstanding such error the judgment is right, or entertains a reasonable doubt on the subject, a case is presented where the exceptant was necessarily prejudiced within said action.

An instrument dated September 13, 1880, purporting to be the last will and testament of S. was presented for probate by one L. L. was the chief beneficiary under the will. He was a lawyer, drew the will, and had been the legal adviser of S., and had drawn several wills for her prior to the one in question. The will in question was drawn and executed on the day of

its date, during the last sickness of S., five days before her death. She had no heirs or next of kin, and at the time of her death was more than seventy-five years of age. The probate of the will was contested by H., on the ground of the incapacity of S., and of fraud and undue influence. H. was a legatee in wills of S. executed February 13, 1878, July 13, 1880, and July 18, 1880, the last two being drawn by L. By the first and second wills H. was made residuary legatee, and by the third was given a legacy of \$3,000 and other legacies to the amount of \$2,500, and L. was made residuary legatee. By the will in controversy S. gave to a church \$500, to one P. \$500. to the son of L. \$2,000, to one H. her stock in the L. S. RR. Co., and to L., whom she made executor, the residue of her estate. To show the incapacity of the testatrix the contestant called two physicians who had attended her in her last sickness, who were permitted, against the objection of the proponent, to express an opinion in respect to her mental capacity, founded upon their observation of her during her illness, and to state facts of which they became cognizant in their professional capacity, tending to prove that the testatrix was *non compos mentis*. There was other evidence bearing in the same direction. This was controverted by the proponent by evidence tending to show that the testatrix, when the will was made, was of sound and disposing mind and memory. To rebut the charge of undue influ-

ence, the proponent produced a will of S., drawn by her and executed in 1870, by which she gave to the proponent and his family substantially her whole estate; also a will dated August 10, 1880, but which, in part, was drawn and executed September 10, 1880, containing substantially the same provisions as the will in question, but which, having been witnessed by the proponent, the principal beneficiary, was superseded by the new will to obviate this objection. The proponent was permitted, against the objection of the contestant that he was an incompetent witness under § 829 of the Code, to testify to the contents of a last will drawn by him and executed by S. about twenty years prior to her death, whereby she gave her estate to a child of proponent, now deceased, and also that the will of September 10, 1880, was drawn from a memorandum made by him September 10, 1880, at the house where S. resided, with a view to the will executed on that day.

*John E. Van Etten*, for applt.

*J. Newton Fiero*, for respnt.

*Held*, That the mere fact that the proponent was the attorney for the testatrix created no presumption against the validity of the legacy to him. 23 N. Y., 9; 91 id., 539; L. R., 2 P. & D., 462. But taking all the circumstances together, the fiduciary relation, the change of testamentary intention, the age and mental and physical condition of the testatrix, the fact that the proponent was the draftsman and principal beneficiary under the will, and took an active

part in procuring its execution, and that the testatrix acted without independent advice, a case was made which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammelled and intelligent expression of the wishes and intention of the testatrix. Note to *Huguenin v. Basely*, 2 Ldg. cases in equity; Redfield on Wills, 515.

*Also held*, That the evidence of the proponent as to the will executed by her in 1870, and as to the will dated August 10, 1880, was incompetent under § 829 of the Code of Civil Procedure, as it related to personal transactions and communications between the witness and the decedent.

*Also held*, That the contestant was a person deriving an interest under the deceased within the meaning of said section. The probate of a will is a special proceeding. Code, § 3334. By appearing to contest the probate the contestant became a party thereto. Code, § 2617. She occupies a position which, though not precisely analogous, is similar to that of heirs-at-law or next of kin contesting the will of their ancestor.

The last clause of section 2545 of the Code declares that no decree or order of a surrogate shall be reversed for any error in admitting or rejecting evidence, "unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby."

*Held*, That this section did not intend to prescribe that no decree of a surrogate should be reversed



for errors in admitting or rejecting evidence unless it appeared to the appellate court, in the one case, that the evidence erroneously admitted furnished the only foundation for the judgment, or in the other, that the rejected evidence, if it had been admitted, would have conclusively entitled the appellant to a decree in his favor. Under this section when the court of review finds that incompetent evidence has been received or competent evidence rejected, it is its duty to determine whether the error prejudiced the party against whom it was committed. If the evidence was important and material and the court cannot say that notwithstanding the error the judgment is right, or if it entertains a reasonable doubt upon the subject, a case is presented where the party excepting was necessarily prejudiced within said section.

Judgment of General Term, affirming decree of surrogate admitting will to probate, reversed.

Opinion by *Andrews, J.* All concur, except *Miller, J.*, not voting.

### WILL. CONSTRUCTION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Almira E. Page v. Harry A. Gilbert, *respt.*, Almon Bennett et al., *appls.*

Decided April, 1884.

A bequest to certain beneficiaries specifically named, *Held*, in the light of surrounding circumstances, to be a gift to the benefi-

aries named as a class, and not as individuals.

Appeal from portions of a judgment entered on the order and decision of Special Term.

The will of B., after giving all his estate to his wife for life, continued: "2d. I give \* \* to my wards, Carrie E. and Harry A. Gilbert, now living with me, children of Eliza H. Gilbert, \*

\* deceased, one undivided half of all my estate, \* \* from and after the decease of my beloved wife, \* \* to have and to hold the same to the said Carrie E. and Harry A. Gilbert, their heirs and assigns, \* \* forever." By the third clause of the will the testator divided the other half of his estate into two equal parts, one of which he directed should be divided equally between the children of his brothers and sisters, and the other between the heirs of his wife's brothers and sisters, without naming such children or heirs. His wife and Carrie E. died before the testator. Did Carrie's share under the second clause lapse, and so pass to testator's heirs at law, or did it vest in Harry A. Gilbert as her survivor.

*Adelbert Moot*, for applts.

*F. C. Peck*, for respt.

*Held*, That the bequest in question was intended as a gift to the beneficiaries therein named as a class, and not as individuals, and the specification of their names must be subordinated to that intent, for

1. The legal presumption that testator did not intend to leave

any part of his estate undisposed of is clearly corroborated by several provisions of the will.

2. The fact that testator did not alter his will during his survival of Carrie for more than a year is strong evidence that he thought her share would go to her brother as survivor, and that he intended that result; for in no other way could his will dispose of his whole estate.

3. The fact that the beneficiaries named in the second clause were taken by testator into his family after the death of his own son and daughter, and that they, or the survivor of them, lived with him till his death, and the fact that he called them his wards, although he was not their legal guardian, indicated that he intended to treat them as his children, and that as such they should take one half of his estate, in which case the share of one dying would vest in the survivor by inheritance.

4. Testator did not intend that his brothers and sisters should take anything under his will.

5. The clear intention of testator that his wife's collateral relatives should share equally with his own collateral relatives is inconsistent with the idea that he intended the share of either of the beneficiaries named in the second clause, dying before himself, to go to his heirs at law.

6. The designation by name was necessary to show which two children of Eliza A. Gilbert were intended, as she had three; and the description as "wards now

living with me" was not certain and accurate.

7. The will was drawn by testator *inops consilii*, and it is not to be supposed he knew the technical signification and effect of a gift to several persons, *nominatim*. That he did not in the third clause name the beneficiaries may well be accounted for upon the supposition that he did not know all their names, in view of the evidence as to their numbers and their scattered residences, and so he treated them all alike and named none of them. See 23 N. Y., 366, 373; 59 id., 202; 81 id., 281, and cases cited by Danforth, J.

Judgment affirmed, with costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### INJUNCTION. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Thomas Kelly, *respl.*, v. James J. McMahon, *applt.*

Decided April, 1884.

Where the complaint in an action in which an injunction was issued was dismissed "without deciding whether plaintiff was entitled to such injunction," and no further action was taken to determine that question, *Held*, That defendant was not entitled to a reference to ascertain his damages sustained by reason thereof.

Appeal from order denying motion for a reference to ascertain the damages sustained by defendant by reason of the issuing of an injunction.

This action was brought to re-

form a lease of a hotel and to restrain defendant from ejecting plaintiff from the demised premises by means of summary proceedings. The lease stipulated that plaintiff should leave on one month's notice in case the hotel was sold, which notice had been given.

On the hearing of the action it appeared that plaintiff had voluntarily surrendered possession to the vendee of defendant and had left the premises, whereupon the referee declined to hear the case on the merits merely for the purpose of deciding the question of costs and dismissed the complaint, but without prejudice to the right of defendant to take such action as he may deem advisable to recover damages sustained by reason of the injunction "without hereby deciding on the question whether plaintiff was or is entitled to such injunction, or whether defendant is entitled to any damage by reason thereof." The judgment entered on the report contained a statement that the referee did not find or decide whether plaintiff was entitled to the injunction.

*E. D. Northrup*, for applt.

*G. M. Rider*, for respt.

*Held*, No error; that it expressly appears that it never has been determined by the referee or the court that plaintiff is not or was not entitled to the injunction. Because there is no final decision of the court that plaintiff was not entitled to the injunction there was no breach of the undertaking shown, and therefore the Special

Term properly refused the order of reference to ascertain damages. 71 N. Y., 106; 82 id., 364; Code Civ. Pro., § 620.

*Vanderbilt v. Schreyer*, 28 Hun, 63, distinguished.

That this being an equity action the court could have expressly reserved the questions relating to the injunction, and that as the referee omitted to pass upon that branch of the case defendant might have applied for an order to compel him to do so, and might have excepted to his refusal to pass upon such questions, and on a case presenting the proper exceptions had a review of the refusal of the referee and a reversal of his decision. But instead defendant acquiesced in the course pursued by the referee and contented himself with just such a judgment as the referee directed. It was not within the power of the Special Term, when the order of reference was asked for, to alter or vary the judgment entered on the decision of the referee, or to determine that plaintiff was not entitled to the injunction. 2 Lans., 90; 14 Hun, 477.

Order affirmed, with costs, etc.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## FRAUD.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Ransom J. Horton, respt.*, v. *George H. Dorr et al., applts.*

Decided May, 1884.

The complaint was on a promissory note and for the price of a machine. The answer alleged that the note was given for a patent right; that the sale of the patent right and the machine was induced by fraud and that both were worthless. Defendant offered to show these facts as a defense and as a counter-claim. The court directed a verdict for plaintiff on the ground that defendant should have alleged an offer to restore the property. *Held*, Error. In an action for damages for the fraud no return of property is necessary, and its retention is not a bar.

The complaint is on a promissory note for \$160 and for a fanning mill sold, \$18. The answer alleges that the note was given for a patent right and that the sale of the patent right and the fanning mill was induced by fraud; that they were utterly worthless and the note without consideration. On the trial the court refused to hear any evidence of fraud, because no offer to restore the property was alleged. The defendants offered to prove the property worthless; also to prove these facts as a counter claim. The court refused. Defendants excepted. The court directed a verdict for plaintiff.

*L. M. & L. K. Soper and John M. Kellogg*, for appls.

*Morris, Kellogg & Morris*, for resp't.

*Held*, Error. In an action for damages for the alleged fraud no return of property is necessary. On the other hand it is necessary where a party rescinds. This distinction is pointed out in *Cobb v. Hatfield*, 46 N. Y., 533, and *Lindsley v. Ferguson*, 49 N. Y., 623, is similar. See 54 N. Y., 415.

That retention of that which was obtained by the alleged fraud-

ulent contract does not prevent the recovery of damages for the fraud is sustained by 1 N. Y., 305; 3 Hun, 734; 64 N. Y., 731; 27 Hun, 166; 52 N. Y., 399.

Plaintiff also alleges that the matters set up in the answer are alleged as a defence and not as a counter-claim. But plaintiff was fully informed as to the defence, and on the trial defendant can probably amend if necessary by inserting the words as a counter-claim.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### ASSIGNMENT FOR CREDITORS. LEASE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Elizabeth C. Smith, respt.*, v. *Edward H. Newell. applt.*

Decided May, 1884.

In 1877, but before Ch. 466, Laws of 1877, went into effect, S. made an assignment for benefit of creditors, and his assignee leased premises before filing a bond or inventory. After filing the same the assignee recognized the lessee as tenant and accepted rent. *Held*, That the assignment was not void and that the acceptance of rent ratified the lease if invalid when made, and that under it the tenant was entitled to the crops.

Action for wrongful taking of plaintiff's hay. Defence that the hay belonged to plaintiff's husband, was levied on upon an execution against plaintiff and sold to defendant by the officer. It appeared that the husband owned a farm; he made an assignment May

9, 1877, recorded May 10. No bond was filed until August 3, 1877. An inventory was made August 2, 1877, and filed August 3. There was, however, attached to the assignment a schedule of the assignor's property and of his debts. On May 11, 1877, the assignee, in writing, under seal, leased the farm to plaintiff for six months for \$200. Plaintiff and her husband continued in possession, worked the farm and cut the hay in question. On August 17 the hay was levied on. Plaintiff had a verdict.

*F. R. Gilbert*, for applt.

*W. H. Johnson*, for respt.

*Held*, That the judgment was right. Ch. 466, Laws of 1877, did not take effect until June 16, 1877, which was after the assignment and the making of the lease. Ch. 348, Laws of 1860, as amended by Ch. 56, Laws of 1875, contains nothing declaring that the neglect to make an inventory or to file the bond shall make the assignment void. The statute only says the bond must be given before the assignee can sell property.

Defendant insists that the assignee had no right in any event to lease the property. If this be so, still the fact remains that by the assignee's consent plaintiff went on the land and paid the rent. This payment would entitle her to the crops, at least until the whole agreement was rescinded. And in that case it would seem that she should be repaid for what she had paid for rent. It might be said that the assignee sold her the crops for \$200.

It is also said the assignee, not having filed his bond, could not make a valid lease. After filing his bond the assignee continued to treat plaintiff as tenant, and this must be taken as a ratification. If the assignee did so ratify he would only be acting in good faith. For he had allowed plaintiff to cultivate and pay rent from May, and when he became qualified in August to ratify his agreement it was proper for him to do so. Any other course would have been a fraud on plaintiff.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### CONTRACT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Arthur B. Guinnip v. Hiram Close.*

Decided April, 1884.

Where the parties orally agreed to exchange lands, and defendant agreed to pay certain mortgages on the land to be transferred to him, and afterwards the parties signed a written agreement providing that plaintiff should convey subject to the mortgages, and plaintiff ultimately deeded according to contract, subject to the mortgages, but neither the written agreement nor the deed contained defendant's agreement to pay the mortgages and defendant failed to pay them, *Held*, That testimony of defendant's oral promise to pay the mortgages was admissible in plaintiff's suit to recover money paid by him on the mortgages.

Payment of a judgment by a note is good when the note has been received in satisfaction of the judgment.

Motion by defendant for new trial on exceptions taken at cir-

cuit and ordered heard at General Term in first instance.

Action to recover money alleged to have been paid by plaintiff for defendant's use.

In Feb., 1879, the parties orally agreed to exchange lands. Plaintiff's land was encumbered with mortgages for \$4,500 and accrued interest, and he valued it at \$7,000, and also proposed to let defendant have the growing wheat and other personal property for \$200. Defendant's land was valued at \$2,700, and he was to take plaintiff's land subject to the \$4,500 mortgages, which sum, according to testimony on plaintiff's part, defendant agreed to pay on the mortgages. Plaintiff agreed to reduce the mortgages to that sum by April 1, 1879, when they were to exchange deeds. Shortly after the oral agreement the parties signed a written agreement providing that plaintiff should reduce the mortgages to \$4,500 and convey subject to them; and on April 1 plaintiff deeded in pursuance to the contract, for the express consideration of \$7,000, free of all encumbrances except such mortgages for \$4,500. Neither the written contract nor the deed contained defendant's agreement to assume and pay the mortgages, nor did they say who was to pay them, and the deed did not refer to the personal property. Defendant went into possession, and had the wheat and other personal property. He failed to pay the mortgages, and one of them was foreclosed and sale had, resulting in a deficiency for which judgment was

entered against this plaintiff. That judgment plaintiff paid with his negotiable promissory note which was accepted in full payment, and the judgment was satisfied and discharged. Plaintiff testified that when the written contract was drawn and executed defendant suggested it was no use to put in his agreement to pay the mortgages, and he then reiterated his promise to pay them. This testimony and all the testimony tending to establish defendant's alleged parol agreement was controverted, but was submitted to the jury, who found for plaintiff.

*George L. Bachman*, for deft.

*Charles A. Hawley*, for plff.

*Held*, Plaintiff's testimony shows that the parties intended to keep the parol promise in force and not to merge it in the writing. And it was not merged in the deed, as it was wholly independent of the contract embraced in that instrument and in no respect contradicted it. 18 Hun, 458, and cases cited by Boardman, J.; S. C. affd., 83 N. Y., 610. Besides, the testimony shows that the promise was part of the consideration expressed in the deed, and it was admissible to show the consideration. 70 N. Y., 54, and cases cited by Allen, J., p. 59.

The payment of the judgment by plaintiff's note was good. 13 Hun, 662, and cases cited by Mullin, J.

New trial denied and judgment ordered for plaintiff on verdict.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## NUISANCE. SEWERS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Julius P. Morgan, *respt.*, v. The City of Binghamton and John W. Sullivan, *appls.*

Decided May, 1884.

The City of Binghamton, by its Common Council, adopted a map and plan of its Fourth Ward preparatory to sewerage the same. The plan contemplated a main sewer in Carroll street into which many other sewers were to empty. Plaintiff, owner of property on the bank of the Susquehanna River, near and below the mouth of the proposed sewer, obtained a temporary injunction restraining the construction and use of the sewer. On the trial it appeared that in different years and at different times of the year the bed of the river was alternately wet and dry; that sewage would probably collect and that in the course of two or three years a nuisance would in the ordinary course of events be created which would be dangerous to health; that the use of the sewer by the inhabitants of Carroll street alone would not create such nuisance; that the proposed system was not the only possible method of draining the ward and that by another construction sewage would probably be carried off by the river without evil effects. *Held*, That a judgment confining the use of the sewers to the inhabitants of Carroll street was proper.

This action is against the city of Binghamton, created such by Ch. 291, Laws of 1867, and against one Sullivan, its contractor, to restrain the construction of a sewer in Carroll street, to discharge into the Susquehanna river near plaintiff's property in said city. The sewer in question was intended as a trunk sewer into which other minor sewers were to empty if the plan of the city was carried out. The minor sewers would cover a quarter of the city. Plaintiff's

property was directly on the bank and below the mouth of the sewer.

It was shown that at different stages of the river the bed of the same was wet and dry, and that in the course of two or three years there would be a probable accumulation of sewage which would be injurious to health, &c. At first the court granted a temporary injunction restraining both the construction of the sewer and its use. But a month later this was modified so as to allow defendants to finish the sewer, but restraining its use. During the action the sewer has been completed. Upon final judgment the court found that the use of the sewer by the inhabitants of Carroll street only would not create such a nuisance as to be dangerous, while if connected with other sewers, as proposed, it would in time produce a nuisance; that thus connected it could not be used with safety and that the danger would be imminent. Judgment was ordered restraining the city from the use of the sewer except by the inhabitants of Carroll street. The judgment directed that the defendant Sullivan be released and discharged from all further connection with the action, but without costs against plaintiff. Both defendants appeal.

A. D. Wales, for City, applt.

W. M. Hand, for Sullivan, applt.

G. L. Sessions, for respt.

*Held*, That as to the city the judgment was right. We recognize the correctness of the rule laid down in *Lynch v. Mayor*, 76 N. Y., 63, that the construction

of sewers in a city is committed to the discretion of the Common Council, but on the other hand nothing held in that or other cases permits a city to discharge sewage upon the property of a person to his injury. 67 N. Y., 204; 79 N. Y., 470.

Defendant insists that the nuisance, if any, is public, and that therefore plaintiff cannot complain. But if plaintiff is specially injured in a way in which the whole public is not injured, then though the public may have a remedy plaintiff is not remediless. Offensive manufactures may be public nuisances, but if they specially annoy several persons in respect to separate lands owned by them these persons have a remedy.

It also urged that the court should not interfere to prevent a merely apprehended injury. This sewer was but the beginning of a system. If plaintiff remained inactive and permitted the city to go on and expend money in building sewers which he knew would prove a nuisance, and then came into equity for relief, the city might with great force claim that he was estopped.

That no injury will be produced, probably, the first year is not material. The court has found that in two, and almost certainly in three years the nuisance will have been created. And in this case we take the conclusions of the court upon the questions of fact as almost final. By consent the court examined the premises and surroundings. The Court has also found that this system of sewerage

is not absolutely necessary. That by another construction the sewage could be carried to a different point. That there there is a larger volume of water, and the evil would probably not arise. The judgment was wrong as to the defendant Sullivan. He was a proper but not a necessary defendant. He was restrained from prosecuting the work for about a month. His contract was only for the Carroll street sewer. The *construction* of that sewer is held proper below. He may be entitled to claim damages under the undertaking given on the injunction. We think him entitled to final judgment deciding that there should be no injunction against him, but without costs of the action. He should have costs of this appeal. The judgment as to the city is affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

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MORTGAGE. ASSIGNMENT.  
N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Margaret Mallock, *respt.*, v. Jane Robinson, *applt.*

Decided May, 1884.

A bond and mortgage may pass by delivery, but such delivery must be by the owner or his duly authorized agent. Delivery by one in possession of the instruments only as agent to collect the interest passes no title.

In case of such unauthorized assignment and delivery by an agent of the owner to an innocent purchaser the principle that where one of two innocent persons must suffer the



loss should fall upon that one who has made it possible, does not apply.

A bond and mortgage will pass by assignment although the instruments themselves are not delivered at the time.

Plaintiff owned a bond and mortgage. She left it with one Emmet O'Neil, described as an attorney, with authority to him only to collect the interest. O'Neil sold the bond and mortgage to defendant for full value and delivered at the same time an assignment of the same purporting to be signed by plaintiff and acknowledged before O'Neil. This action to have the assignment declared a forgery was tried by the court and decided in plaintiff's favor.

*J. H. Clute*, for applt.

*S. W. Jackson*, for respt.

*Held*, Assuming that the question of fact was correctly decided, and we think it was, the judgment is proper. Defendant says a bond and mortgage may pass by delivery and that they were in O'Neil's possession. This is true of the owner or one who shows himself to be assignee, but it is not true of one who is merely in possession as agent to collect the interest. It is further said that where one of two innocent parties must suffer the loss should fall on that one whose act has given opportunity for the wrong. That principle does not apply. 75 N. Y., 562. The possession of the bond and mortgage did not enable O'Neil to commit the wrong. The wrong was committed by the forged assignment. The assignment, if genuine, would have transferred the bond and mortgage even though

they were not delivered. And their delivery unless made by the owners or by an agent authorized to make delivery would have been ineffectual. This is a case of hardship where both parties are innocent. But the question must be decided by the legal question whether the bond and mortgage were in fact assigned. The court has found that they were not. There is really no doubt about it. Therefore the judgment is right and is affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### NEGLIGENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Melinda Smith, *exrx.*, *respt.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided May, 1884.

While in actions based on negligence the question of contributory negligence is for the jury, it is not always so.

Where the facts are not disputed the question must be whether inferences can be drawn logically from such facts in any other than one way, and to say whether they can be drawn logically in any other than one way is the province of the court.

Upon the facts in this case, *Held*, That the deceased was guilty of negligence, and that upon this point there was no question for the jury.

The action was to recover damages for the death of plaintiff's intestate. Plaintiff recovered.

*D. M. K. Johnson*, for applt.

*H. B. Cushney*, for respt.

*Held*, That upon the evidence there was no question but that the

deceased was guilty of negligence. We are embarrassed in considering this case by *Hart v. Hudson River Bridge Co.*, 80 N. Y., 622, relied on by plaintiff. In that case there was no evidence whatever that the deceased had not been guilty of negligence, and yet it was held that the question was for the jury. The logical result of the *Hart* case seems to be that every case of negligence is for the jury. It seems to us that that case should be limited and that the question should be, not whether inferences can be differently drawn by different minds, but whether they can logically be drawn, from the facts proved, in any other way than one way. And to say whether they can logically be drawn in any other than one way is the province of the court guided by its legal training.

In this present case the jury drew the inference that the deceased was not guilty of negligence from undisputed facts which seem to us to show negligence beyond all question. Deceased was familiar with the locality, knew the train was late, was expecting its arrival, was driving south slowly with a manageable team. There were six tracks running east and west, No. 6 being nearest him. To the east of him, on No. 6, was a hay car. As he approached the tracks, because of this hay car and houses, he could not see east on track No. 2, from whence the train came. But when he was on track No. 6 he could see east 300 feet on track No. 2, and when he reached track No. 5 he

could see east 2,000 feet. From the south rail of track No. 6 to the south rail of No. 2, where he was struck, was 43 feet. The engineer had put on the automatic brakes when 1,200 feet from deceased and had shut off steam at 400 feet. The deceased saw the train, as his counsel admits, when he was on track No. 4 and when it was distant 600 feet. He hurried up his horses, nearly got across No. 2, when the hind wheel of his wagon was struck and he was killed. The counsel says that the deceased's reason for hurrying on was that he was, at No. 4, in great danger of trains backing down from the east and west. We can find no evidence that any train was moving except the train which struck him. There is no evidence to show that if he had stopped after passing the hay car he would have been in any danger, or that his horses would have been frightened. The truth is he thought he could cross in front of the train, took the risk and was mistaken. The case is much like *Connelly v. N. Y. C.*, 88 N. Y., 346.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## WILLS. UNDUE INFLUENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*In re* probate will of *Rhoena Ellick*, deceased.

Decided May, 1884.

Proof of interest and opportunity is not sufficient to invalidate a will for coercion or undue influence, but affirmative acts must be shown which of themselves or by just inference establish one or the other of these grounds of complaint.

To invalidate a will the influence must be such as to deprive testator at the time of the free exercise of his will, and must be exercised in respect to the very act.

Where there is direct, positive and unequivocal evidence gainsaying the exercise of such influence, and showing capacity, mature deliberation, settled purpose and absence of fraud and imposition, the will must be carried into effect.

Where, on appeal from a decree refusing to admit a will to probate on the ground of undue influence, the court is in doubt as to the correctness of the surrogate's decision the proponent is entitled to have the case reconsidered by a jury.

Appeal by the proponent, Cornelia Ellick, from a decree of the Surrogate of Tompkins County, adjudging an instrument offered for probate as the last will and testament of Rhoena Ellick, deceased, to be null and void by reason of restraint and undue influence, and refusing to admit it to probate.

The testatrix was, at the time of her death, about seventy-four years of age, and the instrument offered for probate was executed about two years previously. Her only heirs-at-law and next of kin were a daughter—the proponent and sole beneficiary under the will—and two grand children, children of a deceased daughter. By the instrument in question a former will in favor of the grandchildren was revoked.

*J. D. Smith*, for proponent and applt.

*Jared T. Newman*, for contestants and respts.

*Held*, That where a will is claimed to be invalid because its execution was procured by means of coercion and undue influence, the rule of law is that the influence must be such as to deprive the testator, at the time, of the free exercise of his will, and it must be exercised in respect to the very act.

It must also appear that the will was obtained by influence amounting to moral coercion destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse, or too weak to resist.

Although undue influence in obtaining a will may be established by circumstances and influences, as direct proof of it can but rarely be secured, yet when there is direct, positive and unequivocal proof gainsaying it, and showing capacity, mature deliberation, settled purpose and an absence of fraud and imposition, the will must be deemed to be an exercise of personal right to be respected and carried into effect.

It has been repeatedly decided that interest and opportunity are not sufficient to invalidate a will for coercion or undue influence; that affirmative acts must be shown which, of themselves or by just inference, establish one or the other of these grounds of complaint. 68 N. Y., 152; 66 id., 149; 70 id., 394; 77 id., 539; 18 Hun, 404.

Where, upon appeal from the

decree of a surrogate, refusing to admit a will to probate on the ground of undue influence, the court is in doubt, upon the testimony, as to the correctness of the surrogate's decision, the proponent is entitled to have the case reconsidered before a jury, and the court may order it to be tried by a jury at the circuit.

Decree of surrogate reversed, and the case ordered to be heard at a circuit before a jury.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

#### CORPORATIONS. AGENCY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Bentley S. Morrill, *respt.*, v. The  
C. T. Segar Manuf'g Co., *applt.*

Decided May, 1884.

In the absence of record evidence the acts of corporations may be proved by the testimony of witnesses, and even where no direct evidence of them can be given facts and circumstances may be proved from which they can be inferred.

The omission to make an entry in the minutes of a private corporation of the proceedings of a particular meeting will not render such proceedings void nor preclude a party from showing what proceedings were had.

The officers at a regular meeting may bind the company in the matters of its business by special action in any way that shall be deemed advisable, notwithstanding its by-laws require contracts to be binding shall be made in a particular way and form.

Where a written instrument raises on its face a question as to the personal liability of the party signing it parol evidence is admissible to show the intention of the parties, and where it is made to appear that the party signing in fact acted for another with au-

thority so to do and it was so understood by the parties the principal will be charged.

Appeal from judgment entered on verdict.

The action was brought for a breach of contract. The complaint alleged that the defendant held a contract with C. & B. Turner for the sale and delivery by the latter to the former of 500,000 feet of lumber, to be delivered on boat at the dock at Plattsburgh; that the defendant contracted with the plaintiff to receive said lumber for the former, from time to time, on his boat at P. and transport it to and unload it on the dock at Utica, for \$2 per thousand feet; that the defendant refused performance, to the plaintiff's damage. The defence urged, on the trial, was that no binding contract was entered into between the parties. The plaintiff proved a contract in writing, made by deed between himself and C. T. Segar, the latter signing it "C. T. Segar, Sec. and Treas.," to the purport above stated. He further proved, by parol, that C. T. Segar was the Secretary and Treasurer of the defendant's company and its general manager; that at a meeting of the officers of the company shortly prior to the entering into the contract with the plaintiff Mr. Segar was authorized to obtain lumber for the company, and thereupon proceeded to Plattsburgh, and the contract counted on was made.

It was objected that proof by parol of the meeting of the company, and of the authorization of Segar to obtain lumber for the company

was inadmissible. There was no proof given or offered showing that there was a record of the proceedings had at the meeting as to which parol evidence was given.

The verdict was for \$200.

*W. T. Dunmore*, for applt.

*John B. Riley*, for respt.

*Held*, That the acts of corporations may be proved in the same manner as the acts of individuals. If there be no record evidence they may be proved by the testimony of witnesses.

And even when no direct evidence of such facts can be given, facts and circumstances may be proved from which acts may be inferred.

That there being no law requiring a private corporation to keep a record of its meetings or proceedings, the omission to make an entry in the minutes of a corporation of the proceedings of a particular meeting will not render the proceedings null and void, nor preclude a party from showing what proceedings were had.

That the fact that the by-laws of a corporation show that its contracts, to be binding, shall be made in a particular way and form, will not prevent or render invalid such special directions, authorizations or contracts as shall be made by the company at its meetings.

The officers at a regular meeting may bind the company in the matters of its business, by *special action*, in any way that shall be deemed advisable.

The rule now is that where a written instrument raises on its face a question as to the personal

liability of the party signing it parol evidence is admissible to show the intention of the parties.

And when it is made to appear that the party signing in fact acted as agent for another, with authority from his principal so to act, and it was so understood by the parties, the principal will be charged.

Judgment affirmed, with costs.

Opinion by *Bockes, J.; Learned, P. J.*, and *Boardman, J.*, concur.

## DIVORCE. INTERVENTION. COSTS.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

*Sarah M. Simmons v. Zachariah E. Simmons.*

Decided May, 1884.

A third person, not a party to a divorce suit, cannot intervene or apply by petition to have the decree granted in such suit vacated on the ground that it was collusively and fraudulently obtained.

On the dismissal of such a petition the court may impose costs against the petitioner, although it may finally be held that the court was without jurisdiction of the subject matter; but it has no authority to impose upon the petitioner the payment of a specific sum in gross as compensation to the opposing party for disbursements and counsel fees.

A judge has no authority to correct an error in an order made by him unless the parties are before him in pursuance of some formal legal process, or unless, being present, they consent that the subject may be judicially considered.

Appeal from an order of the Special Term, purporting to have been made in this action, denying the prayer of a petition presented

by one Evan J. Henry, in his own behalf, asking to have the decree of divorce granted in such action vacated and declared void, and dismissing such petition; and further, granting an allowance of \$350 to the plaintiff as "compensation for disbursements and counsel fees" in the proceeding based on such petition.

*W. C. Beecher*, for applt.

*C. H. Woodbury*, for respt.

*Held*, That a third person, not a party to a divorce suit, cannot apply to the court, by petition, to have a decree of divorce granted therein vacated and declared void on the ground that it was collusively and fraudulently obtained, being the result of a conspiracy between the parties to the action and others named.

Such a petitioner, not being a party to the action, and having no interest, legal or equitable, in the subject matter of it, has no standing in court or right to intervene in the action, and the petition should be dismissed.

On such a dismissal it is competent for the court to impose costs against the petitioner, even though it should be finally held that the court was without jurisdiction of the subject matter of the application.

The petitioner having submitted himself to the jurisdiction of the court by bringing before it other parties to be heard on the matter of his petition, and the court having assumed jurisdiction and adjudicated upon the subject of controversy, it does not lie with him

to deny that the court had jurisdiction in order to escape liability for the costs of his proceeding.

But the court, on dismissing the application, has no authority to impose upon the petitioner the payment of a specified sum in gross as "compensation" to the party called before the court by him for her "disbursements and counsel fees" incurred in the proceeding.

A judge of the court has no authority, any more than has any third person, of his own motion, without having the parties before him in pursuance of some formal legal process or proceeding, or unless, being present, they consent that the subject may be judicially considered, to make an order in a pending suit or proceeding, or even to correct an error in an order theretofore made therein.

The same formalities are requisite to confer jurisdiction upon a judge or court to amend or correct an order previously granted in a matter in litigation as would be necessary to obtain the order in the first instance.

The part of the order appealed from dismissing the petition of Evan J. Henry affirmed, and that part making an allowance of \$350 to Sarah M. Henry against said petitioner and directing its payment by the latter reversed, without costs of appeal to either party.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

## RECEIVERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

W. B. Whitney et al v. The N. Y. & Atlantic RR. Co.

Decided March 7, 1884.

A receiver of certain property of a corporation appointed in an action to foreclose a mortgage covering such property can move to vacate the appointment of a receiver of such corporation appointed in a creditor's action to sequester the property of the corporation, to which the receiver in the foreclosure action is not a party, if such appointment is void and injuriously affects him in the discharge of his duty as such receiver.

Having made such a motion he is entitled to notice of any proceedings which may afterwards be taken for the purpose of rendering it ineffectual, and consequently an order confirming the appointment of the receiver in the creditor's action, made without notice to him while his application to vacate such appointment is pending and undetermined, is of no effect.

An action under § 1784, Code Civ. Pro., to procure the sequestration of the property of a corporation is within the terms of § 8 of Chap. 378, Laws of 1883, requiring all motion papers, &c., in certain actions relating to corporations to be served on the Attorney-General, and an appointment of a receiver in such action without notice to the Attorney-General is void. A suit for the foreclosure of a mortgage on the property of a corporation does not come within the terms of said statute and a receiver can be appointed therein without notice to the Attorney-General.

A receiver appointed in a creditor's action brought under § 1784, Code Civ. Pro., to sequester the property of a corporation can be invested with title only to its real and personal property, things in action, contracts, and effects so far as they are owned by the corporation at the time of his appointment, and an order vesting in him its stocks, bonds and franchises, and property encumbered by a mortgage is unauthorized to that extent.

Appeals from several orders denying several motions having for

their object the removal of Geo. H. Henry as receiver of defendant.

The appellant B. was appointed trustee in a mortgage given by defendant to secure the payment of bonds issued by it. Defendant failed to comply with the terms of such mortgage and B. brought an action to foreclose it, in which on July 5, 1883, he was appointed receiver of the property covered by the mortgage, which consisted of all the rights, liberties, privileges, income, tolls, receipts, resources, corporate franchises and railroad then owned by defendant or afterward to be owned, held or acquired by it. Subsequently appellant as such receiver applied for and obtained from the court permission to issue certificates of indebtedness and by that means to raise funds to complete the road of defendant and carry on its business for the benefit of the bondholders.

Previous to the commencement of the action to foreclose the mortgage, but subsequent to its execution and recording, the plaintiffs in this action recovered a judgment against defendant upon which execution was issued and returned unsatisfied, and they thereupon commenced this action under § 1784, Code Civ. Pro., to sequester the property of defendant, and such proceedings were had that on July 2, 1883, George H. Henry was appointed receiver of defendant *pendente lite*, and on July 7 a judgment was entered appointing him permanent receiver of the property, contracts, things

in action, stock, bonds and franchises of defendants.

On Aug. 23, 1883, the receiver in the foreclosure action moved to vacate and set aside the order and judgment in this action appointing George H. Henry receiver, substantially for the reason that no notice of the application for his appointment had been served upon the Attorney-General, as he claimed was required by Chap. 378, Laws of 1883. After the argument of the motion for that purpose and before its decision, plaintiff procured an order upon notice to the Atty.-Gen., but without notice to the appellant, confirming the order and judgment appointing Henry receiver, and for this reason the motion to vacate the order and judgment so confirmed was denied. Subsequently appellant moved to vacate the order of confirmation, on the ground that he had received no notice of the application for it, and for leave to be reheard on the former motion. This motion was denied.

*Burton N. Harrison*, for applt.

*J. Adriance Bush* and *Chas. De Hart Brower*, for respt.

*Held*, That appellant had the right to move to vacate the order and judgment appointing Henry receiver, although he was not a party to the action, if for any reason they were inoperative or void and interfered with and injuriously affected him in the discharge of his duties as receiver in the foreclosure action, 26 How., 167, and that they did so affect him by throwing discredit on the certifi-

cates of indebtedness which he had been allowed to issue.

That appellant by the motion to vacate the said order and judgment had become a party to that extent to this action and was legally entitled to notice of any proceedings which might afterwards be taken for the purpose of rendering his application unsuccessful, and since notice of the application for the order confirming said order and judgment was not given him that order should have had no practical effect in the case and the motion to vacate the judgment and order should not have been denied on account of its entry.

That § 8 of Chap. 378, Laws of 1883, requiring that all motion papers and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon, in every action or proceeding for the dissolution of a corporation or a distribution of its assets should be served upon the Atty.-Gen., and that any order or judgment entered therein without such service should be void, included and applied to this action, and that the order appointing Henry receiver was therefore void.

That a suit for the foreclosure of a mortgage on the property of a corporation does not fall within the terms of the act of 1883 and it was not necessary, therefore, to give notice to the Atty.-Gen. of the application for the appointment of appellant as receiver of defendant in such an action.

That a receiver of a corporation



appointed in a creditor's action to sequester the property of such corporation can only be invested with title to its real and personal property, things in action, contracts and effects so far as they are owned by it at the time of the appointment, Code Civ. Pro., § 1728 and §§ 42, 67, of appendix B., Code of Civ. Pro., and consequently the order and judgment herein appointing Henry receiver were unauthorized so far as they invested him with the stocks, bonds and franchises of defendant and with the property of the corporation covered by the mortgage to appellant, and the orders appealed from should be reversed, and the appointment of Henry receiver should be modified and corrected by striking out the unauthorized portion.

Ordered accordingly.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### ADMINISTRATORS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Joseph Hertzfield, *respt.*, v. Charles Parkes et al., *appls.*

Decided March 7, 1884.

A judgment entered upon a complaint which alleges that defendants, as administrators, employed plaintiff's assignor as attorney-at-law to act for them as such administrators, and that he performed divers services upon and at the request of defendants as such administrators, and that defendants, as such administrators, agreed and promised to pay him a certain sum, is one against the estate, and cannot be converted into a personal one against the administrators upon the

ground that the allegations in regard to their representative character are merely *descriptio personae*.

An executor or administrator cannot bind the estate by an executory contract and thus create a liability not founded upon a contract or obligation of his testator or intestate.

Appeal from order vacating a stay of proceedings and from an order granting a motion to open a judgment in compliance with certain conditions, and denying it if such conditions were not complied with.

This action was brought by respondent as the assignee of one H. It was alleged in the complaint that defendants, as administrators of one P., had employed H., as attorney at law, to act for them as such administrators, and that he had performed divers services upon and at the request of defendants, as such administrators, and that defendants, as such administrators, had agreed and promised to pay him a certain sum, &c. Service of the summons was made only upon defendant R., who gave an admission of such service, and judgment was subsequently entered against defendants by default. Subsequently the defendant Parkes obtained an order to show cause why the default should not be opened and this judgment set aside on the ground that it was irregular and obtained by collusion between plaintiff, his assignor, and the defendant R., who was the client of plaintiff's assignor at the time of the service of the summons herein. The order to show cause contained a stay of proceedings upon the judgment and also

upon a suit instituted by plaintiff in the City Court of New York, against the sureties of defendants, by which he sought to collect the judgment. Subsequently such proceedings were had that the stay was vacated, and the motion to set aside the judgment was granted upon compliance with certain conditions, otherwise it was denied.

*Henry Wehle*, for appls.

*Henry H. Morange*, for respt.

*Held*, That an executor or administrator may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator, and that an action against an executor or administrator on such a contract cannot, upon demurrer, be converted into one against him individually. 47 N. Y., 360.

That if in this action there was nothing stated in the complaint showing the character in which defendants were sued, it might be held that the words were merely *descriptio personæ*, but they are sued as administrators upon a contract made with them as administrators and promises made by them as such, and according to the authority just referred to a judgment following the complaint should be against them as administrators, to be levied *de bonis testatoris*, and that the complaint was against them as administrators upon an engagement upon their part, as such, which did not bind the estate.

That, considering the form of the judgment in connection with the relations between the defendant

R. and plaintiff's assignor, the failure to serve the summons upon the defendant Parkes, and the admission of his co-administrator R. of the service of the summons, the motion to vacate the judgment should have been granted so far as to enable the defendant Parkes to contest the claim of plaintiff.

Ordered accordingly, and that the stay of proceedings in the action against the sureties should be continued.

Opinion by *Brady, J.*; *Davis, P. J.*, concurs.

## WILLS.

### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* settlement of the account of Joseph H. Mahan, ex'r.

Decided March 7, 1884.

The will of testatrix, after providing that her executor should hold two parcels of real estate in trust, to apply the income thereof to the maintenance of her mother and youngest son, or should sell the same and apply the income derived from the proceeds to the same purpose; and that, upon the death of her mother and the coming of age of her youngest son, one of such parcels, or the avails thereof if it should have been sold, should be given to her youngest son, contained the following clause: "And all the rest, residue and remainder of my property and estate I do then give, devise and bequeath to my children John, Thomas, and Mary, the survivor and survivors of them, share and share alike," *Held*, That the right to take the residuum of the estate vested at the time of the death of the testatrix in the three children named; and that, no special intent to the contrary appearing in the will, its reference to survivorship must be construed as referring to the death of the testatrix, the word "then" as indicating the time when

the estate in remainder was to be actually enjoyed.

Where the scheme of a will provides for final distribution of the estate and evinces an intention on the part of the testator that the realty should be sold and converted into money, and such intention has been carried into effect, the will should be construed as directing an equitable conversion.

#### Appeal from final decree of the Surrogate.

The will of testatrix, provided that her executor should hold two parcels of real estate in trust, to apply the income thereof to the maintenance of her mother and her youngest son James, or that her executor, in his discretion, should sell the same and apply the income derived from the proceeds in the same manner. It then provided that, upon the death of her mother and the coming of age of her son James, one of such parcels, or its avails if it should have been sold, should be given to James. Then came the following clause: "And all the rest, residue and remainder of my property and estate I do then give, devise and bequeath to my children John, Thomas, and Mary, the survivor and survivors of them, share and share alike."

Upon the happening of the events named, viz: the death of testatrix' mother, and the coming of age of her son James, Thomas alone of the three residuary beneficiaries was living; Mary at her death had left a husband and no issue, and John had died leaving a widow and one infant son. It was claimed by Thomas that he alone was entitled to the entire residuary estate because he alone "survived" the death of the decedent's mother

and the coming of age of James, and it was claimed by the special guardian of the infant son of John that the right to one-third of such residuary estate had vested in said John at the death of testatrix, and that, although the property had been sold soon after the decedent's death, it should still be regarded as real estate, and that his ward was entitled to the whole thereof as his father's sole heir at law.

*Wm. J. Kane*, for Thomas F. Lyons, applt.

*Townsend & Mahan*, for executor.

*Wm. F. Reilly*, guardian ad litem of John Lyons.

*Walter D. Burke*, for Margaret Lyons, adm'r.

*I. Knox Burton*, for James R. Langdon, adm'r.

*Held*, That the right to take whatever might prove to be the residuum of the estate vested at the death of testatrix in the three children whom the will named as her residuary beneficiaries, and that, no special intent to the contrary appearing in the will, its reference to survivorship must be construed as referring to the death of testatrix herself, and the word "then" in the phrase "I do then give &c.," as indicating the time when the estate in remainder was to be actually enjoyed by the three children, and not the time when the interest was to become vested. 25 Wend, 144; 2 Sandf. Ch., 605; 3 Barb. Ch., 145; 4 Sandf., 36; 48 N. Y., 106; 43 N. Y., 303; 2 T. & C., 181; 52 N. Y., 118; 51 N. Y., 50; 1 Hun, 355; 2 Hun, 531; 12 Hun,

396; 68 N. Y., 227; 70 N. Y., 512; 76 N. Y., 133; 80 N. Y., 225.

That under the English authorities the construction would be in favor of a survivorship among the children. 3 Jarman on Wills, 5th Am. ed., 588.

That the claim of the special guardian could not be sustained. That the power of sale, though in form discretionary, must be regarded, in view of the whole scheme of the will, and especially of the provisions for final distribution of the estate, as evincing an intention on the part of testatrix that the realty should be sold and converted into money, and as accordingly constituting an equitable conversion into personalty from the death of the testatrix. 23 N. Y., 69.

Decree affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

### FORECLOSURE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Elmore A. Kent, *respt.*, v. Sarah H. Popham. *exrx.*, *impld.*, *applt.*

Decided March 7, 1884.

An amendment of a complaint on the trial of an action which strikes out all the allegations contained in it affecting one of the defendants and amounts to a virtual discontinuance of the action as to such defendant should not be allowed except upon payment of all his costs in the action, whether awarded him to abide event upon an appeal from a judgment obtained on a former trial or which accrued in the ordinary way. The only proper parties to a suit for a foreclosure of a mortgage, so far as mere legal  
Vol. 19—No. 11.

rights are concerned, are the mortgagor, the mortgagee, and those who have acquired rights and interests under them *subsequent* to the mortgage, and the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim. The owner of a judgment against the grantor of a mortgagor which is a lien upon the land covered by the mortgage cannot be made a party to a foreclosure suit for the purpose of having the lien of his judgment declared to be subsequent to that of the mortgage.

Appeal from an order amending complaint and from a judgment of foreclosure and sale.

This action was brought to foreclose a mortgage upon certain premises and to have the lien of a judgment recovered by the defendant Popham against the grantor of the mortgagor, and which was docketed prior to the recording of the deed to the mortgagor, declared to be subsequent to the lien of the mortgage for the reason that the said deed was delivered though not recorded prior to the docketing of said judgment.

Defendant denied the delivery of the deed, &c., set up his adverse title, and claimed that the lien of his judgment was prior to that of the mortgage. The action was twice tried. On the first trial a judgment was recovered against the defendant Popham, which was reversed on appeal, with costs to abide event. On the second trial a motion was made by plaintiff to amend his complaint by striking out all the allegations concerning the judgment of the defendant Popham and the prayer that its lien should be declared to be sub-

sequent to that of the mortgage. This motion was granted on payment of the costs of the trial to defendant Popham. The defendant Popham refused to receive such costs and appealed from the order. The trial then proceeded and judgment of foreclosure and sale was entered, from which the defendant Popham also appealed.

*S. F. & F. H. Cowdrey*, for applt.

*E. H. Benn*, for resp't.

*Held*, That the amendment of the complaint striking out all the allegations making the defendant Popham a party and presenting issues as to him was virtually a discontinuance of the action as to him, and should not have been allowed except upon payment of all the costs in the action whether awarded to him on appeal or otherwise.

That the only proper parties to a foreclosure suit, so far as mere legal rights are concerned, are the mortgagor, the mortgagee, and those who have acquired rights and interests under them subsequent to the mortgage, and the mortgagee has no right to make one who claims adversely to the title of the mortgagor and prior to the mortgage a party defendant for the purpose of trying the validity of his adverse claim, 75 N. Y., 127; 2 Seld., 82; 6 Paige, 635; 30 N. Y., 428, and that, therefore, the defendant Popham was not a proper party to this action for the purpose of having the lien of the judgment declared subsequent to that of the mortgage.

Order allowing amendment mod-

ified so as to require payment of all the costs in the action to the defendant Popham, either awarded on appeal to abide event or which accrued in the ordinary way, and judgment so modified as to make it appear distinctly that no rights of the defendant Popham are affected, except as a subsequent incumbrancer, without costs of the appeal to either party.

Opinion by *Brady, J.*; *Daniels, J.*, concurs; *Davis, P. J.*, concurs, except as to the costs of appeal, which he thought should be awarded to applt.

#### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Robert Struthers, *applt.*, v. Adolphus Hoffstadt et al., *respts.*

Decided March 7, 1884.

An affidavit stating that "on Oct. 6, 1883, defendants represented to a commercial agency, as appeared by the report of such agency, that the surplus of their assets over their liabilities was \$46,500; that two of the creditors of defendants had written to such agency stating that they waived payment of their demands until after payment of all other indebtedness; that on Nov. 17, 1883, defendant made a general assignment preferring certain promissory notes; that deponent alleges that some of such preferences were for the demands agreed to be waived; that some of said notes were dated from two to five days prior to the assignment and that the money loaned upon them was not on hand and was not delivered to the assignee; that nothing had happened to cause the loss of the surplus claimed by defendants on Oct. 6th, and consequently the assets must have been concealed, hidden, or disposed of in some underhand way; and that deponent believes that the preferred promissory notes repre-

sent fictitious claims in whole or in part," is not sufficient to sustain an attachment granted upon the ground that defendants had removed, disposed of and assigned their property with intent to defraud their creditors.

Appeal from order setting aside and vacating an attachment.

Plaintiff procured a warrant of attachment on the ground that defendants had removed, disposed of, and assigned their property with intent to defraud their creditors, upon an affidavit stating that "on Oct. 6, 1883, defendants represented to a commercial agency, as appeared by the report of such agency, that their assets exceeded their liabilities in the sum of \$46,500; that two of the creditors of defendants had written to such agency stating that they waived payment of their demands until after payment of all other indebtedness; that on Nov. 17, 1883, defendants made a general assignment preferring certain promissory notes; that deponent alleges that some of such preferences were for the demands agreed to be waived; that some of said notes were dated from two to five days prior to the assignment and that the money loaned upon them was not on hand and was not delivered to the assignees; that nothing had happened to cause the loss of the surplus claimed by defendants on Oct. 6, 1883, and consequently the assets must have been concealed, hidden or disposed of in an underhand way; and that deponent believes that the preferred promissory notes represent fictitious claims in whole or in part."

Defendants moved to vacate the

attachment on the papers on which it was issued and the motion was granted.

*Blumenstiel & Hirsch*, for applt.

*Albert Cardozo*, for respts.

*Held*. That it was neither stated or shown that the preferences made in the assignment were unfounded, or that in any transaction whatever there was good reason to believe that defendants had made the alleged fraudulent disposition of their property. That in this respect the affidavit was materially and radically defective; that it was altogether insufficient to sustain the allegation that was made and that consequently the order setting aside the attachment should be affirmed.

Order affirmed.

Opinion by *Daniels, J.; Davis, P. J.*, and *Brady, J.*, concur.

## TRUSTS. PERPETUITIES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Alice J. Tiers, applt.*, v. *Alex. H. Tiers, exr.*, et al., *respts.*

Decided March 7, 1884.

The will of the testatrix devised her estate in trust to her executors to divide the same into six equal parts; to convey two of such parts to two of her sons; to divide the income of the remaining four equal parts among her three remaining sons and her daughter in equal shares equally during their several and respective lives; upon their several and respective deaths to convey the shares of the principal producing the income of the one so dying to his or her child or children upon their arriving at the age of twenty-one years, and to the issue of any such children who might be deceased at the

death of his parent, but if any such children should die before the age of twenty-one, and without leaving issue, then the share of the one so dying should become part of the residuary estate for the benefit of all the testatrix's children, in the same share and under the same trusts and limitations before provided for; and in the event of either of the testatrix's children dying without issue, but leaving a wife or husband surviving, then the income of the share of the one so dying should be paid to the surviving wife or husband during life, and, after the death or marriage of such surviving wife or husband should be divided according to the terms of the will. *Held*, No unlawful suspension of alienation.

Appeal from judgment recovered on trial at Special Term.

This action was brought under § 1866, Code of Civil Pro., to set aside and declare void the will of Esther L. Tiers, on the ground that it violated the statute against perpetuities.

By the will of testatrix she devised her estate to her executors to divide the same into six equal parts; to convey two of such parts to two of her sons; to divide the income of the remaining four parts among her three remaining sons and her daughter in equal shares equally during their several and respective lives; upon their several and respective deaths to convey the shares of the principal producing the income of the one so dying to his or her child or children upon their arriving at the age of twenty-one years, and to the issue of any such children who might be deceased at the death of his parent, but if any such children should die before the age of twenty-one, and without leaving issue, then the share of the one so dying should become part of the

residuary estate for the benefit of all testatrix' children in the same share and under the same trusts and limitations before provided for; and in the event of either of testatrix' children dying without leaving issue, but leaving a wife or husband surviving, then the income of the share of the one so dying should be paid to the surviving wife or husband during life, and after the death or marriage of such surviving wife or husband should be divided according to the terms of the will.

*Edward Gebhard*, for applt.

*R. D. Harris* and *Ludlow Ogden*, for respts.

*Held*, That by the will the estate was divided into shares, and one of these shares was expressly devoted to each one of the beneficiaries, and under the will the validity of the directions given must be determined by their application to these distinct and severed interests. 33 N. Y., 593; 80 N. Y., 320.

That, in the event of the death of testatrix' children leaving issue, the share of their parents absolutely vested in such issue at the parent's death, and in this event the trust would extend through only one life in being.

That, in the event of any of testatrix' grand children dying after his parent and before the age of twenty-one, and without issue, one-third of his share would be given in trust to each of the surviving children of testatrix during their respective lives, but under the directions which were given the survivors would be entitled to

the benefit of each share of the property so accrued to them distinct and separately from each other, and the trust would therefore not be extended beyond the period of two lives in being at the time of its creation.

That the possibility of either of testatrix' children marrying a person not in being at the death of testatrix, and then dying without issue, and thus by the clause providing for the payment of 'the income of the share of such child of testatrix to his or her surviving wife or husband extending the trust beyond the period of two lives in being, was too remote for consideration, and it was unnecessary to determine whether it would have that effect or not, for if that direction of the will was unauthorized then the estate of the child of testatrix so dying would vest in the legal heirs of testatrix as an absolute legal estate, and to recover it or determine the right to it the surviving wife or husband of the deceased owner of the share would be a necessary party to the controversy, and as that person might not now be living, and consequently could not be made a party to this action, the determination of the controversy must be relegated to that time.

That, since the directions given for the disposition of the estate are separable and distinct and in no manner dependent upon each other, the first trusts would be valid even if the last mentioned one could not be carried into effect. 36 N. Y., 343.

Judgment affirmed.

Opinion by *Daniels, J.; Davis, P. J.*, and *Brady, J.*, concur.

## BOND. HUSBAND AND WIFE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Daniel H. Zimmer, *respt.*, v. David Settle et al., *appls.*

Decided May, 1884.

Defendants gave plaintiff a bond conditioned to properly support, maintain, clothe, board and furnish with all necessaries plaintiff's wife during her natural life; *Held*, That defendants were bound thereunder only to furnish the wife support at their houses or at some suitable place; that it was error to charge that the wife might obtain board anywhere and defendants be chargeable.

Where after the giving of such a bond the husband suffered his wife, who had separated from him, to return to his house and live there, *Held*, That this was a satisfaction and bar to an action by him on the bond.

Where a husband and wife are once more living under the same roof the court will hold as matter of law that there is a reconciliation, and it will not consider the question whether they actually cohabit or occupy the same room.

This is an action on a bond given to plaintiff by defendants, conditioned to support Annie Zimmer, plaintiff's wife. It appeared that in Oct., 1878, the wife left her husband and went to live with David Settle, one of the defendants, her father. In Nov., 1878, she began an action for limited divorce, alleging cruelty. In April, 1879, defendants, in consideration of \$400 paid them by plaintiff, executed this bond, conditioned in substance to support Annie for the rest of



her life and to save plaintiff harmless from all suits, &c., on her account. In July, 1879, Annie returned to her husband. In Aug., 1879, defendants gave written notice to Annie and plaintiff by which she was required to return and receive support from them or they should consider their obligation on the bond ended. Defendants also offered to return the \$400 paid as a consideration for the execution of the bond. Thereafter plaintiff was sued for clothing for Annie which he swore he did not order and judgment was recovered against him. This action is for this judgment and the board furnished his wife by himself after her return. Plaintiff recovered at circuit.

*Geo. S. Camp*, for applt.

*Charles A. Clark*, for resp't.

*Held*, That the action could not be maintained. First, there was error in the charge. The court charged that Annie was not required to remain at defendants' houses, that she could have gone to any other person's house and lived and the contract required them to support her; that if they were not content to have her provided for in the house of her husband they must furnish some other place and see that she goes there. Defendants excepted to this. The primary duty lay on plaintiff to support his wife and he had power to control her. Defendants had no power to control her or to compel her to live in one place or another. If she had gone to a stranger's house while defendants were ready to perform their agreement

what claim would that stranger have? The utmost that defendants were required to do under this contract was to furnish her board at their houses (assuming these to be suitable places) or at some suitable place. 1 Hill, 580; 8 Barb., 552. She had returned to her husband's house and these defendants could not take her away from there.

Second, it was error to submit to the jury the question of reconciliation. The court left it to the jury to say whether plaintiff had, since her return to his house, treated Annie as his wife, or whether he had not simply obeyed the dictates of humanity and allowed her to remain that she might not suffer. On this point the evidence was, that since her return plaintiff and Annie had occupied separate rooms and had not cohabited; that she was not treated as the head of the household, but that her daughter was; that the wife was a boarder. The court had charged that if plaintiff received his wife back voluntarily and received the benefit of her aid and assistance in household duties that this was a reconciliation and was a satisfaction and bar to a recovery upon the bond. This is the law. 3 Paige, 483. It appears here that the husband and wife were living under the same roof. They are then no longer separated. She is under his care and control and entitled to all the privileges and liable to all the duties of a wife. It will not do to pry into their domestic life. Whether they actually cohabit, under the circum-

stances, is of little importance. There was, upon this evidence, no question for the jury.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurs; *Bockes, J.*, concurs, but not without some doubts.

### ACCOUNTING. PARTNER-SHIP. AGENCY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Stephen V. Mores, assignee, *applt.*, v. The Society for the Protection of Destitute Roman Catholic Children at Buffalo, *respt.*

Decided March 7, 1884.

A person buying a share in an existing business and going on with it without any arrest or settlement of the preceding accounts becomes entitled to his interest as a partner in the debts owing to it at the time of his entering it and equally so liable to contribute to the payment of the indebtedness owing by it at that time; and to bring about this latter result it is not necessary that such indebtedness should have been specifically or in terms assumed by the incoming partner.

An agent having authority to sell goods, and collect money, and make settlements has power to receive a check to his own order in payment of a debt to his principal; and if such agent receives the money on such check, the principal must credit his debtor with the amount.

Such an agent would not, however, have power to receive a note to his own order payable at a future date without special authority to that effect.

Appeal from judgment recovered on the report of a referee.

Plaintiff, as the general assignee of the firm of Henry Louis &

Brother, brought this action to recover an indebtedness owing by defendant to said firm. Previous to 1875 the business of said firm had been carried on by Henry Louis alone, and the dealings out of which this controversy arose were begun at that time. In 1875 Adolphus H. Louis bought an interest in the business, and the firm of Henry Louis & Bro. was formed. On the formation of such partnership there was no arrest or settlement of the accounts of the business previously carried on by Henry Louis, but such business was carried right along with the same stock, the same accounts and the same customers. It was claimed by plaintiff that, at the time of the assignment, defendant was indebted to him as assignee in the sum of \$370.38, which indebtedness had accrued while the partnership continued. The action was referred, and the referee reduced the claim of plaintiff by applying upon it payments which had been made to Henry Louis previous to the formation of the partnership, and the plaintiff claimed that the referee erred in this respect.

*E. H. Benn*, for *applt.*

*David F. Day*, for *respt.*

*Held*, No error; that the brother who bought into the business became entitled to his interest as a partner in the debts owing to it, and equally so liable to contribute to the payment of the indebtedness owing by it; and that it was not necessary to accomplish the latter result that such indebtedness should have been specifically

or in terms assumed by him. That the fact that he bought into an existing and continuing business would naturally subject the business to that obligation. That the relations and obligations of the incoming partner were entirely different from what they would have been if the old business had been closed and a new business had been commenced from the time the partnership was formed.

The firm of Henry Louis & Bro. employed a traveling agent who had authority to sell goods, collect money, and make settlements; and, for the purpose of reducing plaintiff's claim, the referee received in evidence two checks drawn by defendant to the order of such agent, the amount of which had been collected by the agent. These checks were objected to upon the ground that the agent had no authority to take checks drawn to his own order.

*Held*, That the agent's authority generally empowered him to collect money, and under such authority he was permitted to receive payment in the form of a check drawn to his own order.

A note given by defendant payable to the order of the agent sixty days after date, and which such agent had procured to be discounted and upon which he had received the money, and which was afterwards taken up by defendant, was also received in evidence. This was also objected to.

*Held*, That, strictly speaking, under his general authority the agent might not have been authorized to take such a note; but that

since in this case the principal had been informed of the design and purpose of the agent to take this note, and had not objected, it is to be inferred that he did not disapprove of the transaction.

Judgment affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

#### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Horace B. Claffin, *respt.*, v. Emil Hirsch, *applt.*

Decided March 28, 1884.

Defendant made a general assignment for the benefit of creditors, and preferred as a creditor his dormant partner in the business. *Held*, That such fraudulent preference rendered the assignment void as to creditors, and the facts formed a sufficient basis for an attachment against the firm property at the instance of one of the creditors.

An agreement by which a person participates in the profits only of a business renders such person a general partner as to third persons.

Appeal from order denying motion to vacate an attachment.

Although there was some conflict in the affidavits, it appeared by a preponderance of proof that plaintiff was a creditor of defendant in the amount sued for, and that defendant had made a general assignment for the benefit of creditors in which one S. had been preferred as a creditor in a sum upward of \$8000, and that in fact S. was a dormant partner and not a creditor.

*Blumenstiel & Hirsch*, for *applt.*

*S. F. Kneeland*, for resp't.

*Held*, The proof showed that S., through her husband, contributed \$10,000 to the business originally upon an agreement to share one-half of the profits of the business. This made S. a general partner as to third persons. 45 N. Y., 797; 76 id., 344, 351. From the statements of the affidavits on defendant's behalf it was made to appear that afterwards, in the course of a few days after the money was originally contributed, a different arrangement was made whereby the contribution to the capital was changed into a loan to defendant, who was to employ the husband of S. on a salary and pay 6 per cent. for the use of the money. But the co-partnership relation having been created it will be presumed to have continued, and the statements of defendant to commercial agencies contradictory to the assertion of the change with respect to the money, together with the deceptive statements on the part of the husband of S. in his affidavit, tend to discredit the arrangement asserted; at least on all the papers the court below was well justified in refusing to vacate the attachment.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady J.*, concur.

### LIMITATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Patience M. Gardner, exrx.,  
*applt.*, v. James Gardner, *resp't.*

Vol. 19—No. 11a.

Decided March 28, 1884.

A partial payment of a debt by a creditor to his debtor takes the claim out of the operation of the statute of limitations and revives the debt as effectually as an acknowledgment in writing signed by the party to be charged thereby.

The findings of a referee against the clear and decided preponderance of testimony will not be sustained, and a judgment based thereon will be reversed.

Appeal from a judgment entered upon the report of a referee.

Action by plaintiff as executrix to recover of defendant, her husband, money loaned by plaintiff's testatrix in her lifetime. The referee found an indebtedness of \$10,000 for balance of such loan at the testatrix' death, but also found such debt had become barred by the statute of limitations, such statute being interposed by defendant as one of his defenses.

The plaintiff, to overcome the effect of the lapse of time, and the defense of the statute of limitations, showed that the testatrix before her death exacted from plaintiff a promise that after her death plaintiff would pay Miss Mills, the sister of the testatrix, the sum of one hundred and fifty dollars annually out of the indebtedness of defendant to her, and the claim for which was bequeathed to plaintiff by the will, plaintiff being the executrix and sole legatee. That defendant was advised of the promise, and at various times paid Miss Mills various sums of money upon such promise made by plaintiff down to about three years before the commencement of this action. Defendant, who was uncorroborated,

asserted these payments to Miss Mills were gratuitous. But Miss Mills swore to the contrary, as did plaintiff. A Mr. Tyson, who was sworn on behalf of plaintiff, also testified that in the winter of 1877 defendant told him that plaintiff claimed an indebtedness from him to the estate of testatrix, and that he had made payments at plaintiff's request to Miss Mills, and further that the payments he made were on account of money he owed testatrix. Another witness swore she had often heard plaintiff demand money from defendant to pay Miss Mills on account of his indebtedness to the Hancock estate.

*C. Fine*, for applt.

*Conlan & McCrea*, for respt.

*Held*, That these payments by defendant took the case out of the statute of limitations. Code, § 395; 66 N. Y., 352; 36 N. Y., 90; 49 N. Y., 155; 54 N. Y., 114.

*Held further*, That the decided preponderance of the evidence supported the fact of these payments by defendant to Miss Mills on account of his indebtedness to the Hancock estate.

Such being the case the judgment must be reversed and a new trial ordered. costs to abide the event.

Opinion by *Brady, J.; Davis, P. J.*, and *Daniels, J.*, concur.

## MONEYS PAID. AGENCY.

### N. Y. COURT OF APPEALS.

*Knapp, applt.*, v. *Simon*, impld., *respt.*

Decided June 10, 1884.

Plaintiff purchased certain grain for defendants' firm without disclosing who his principals were. The vendor, on discovering who they were, brought action against the firm, but discontinued it on payment of part by defendant and gave him a release from individual liability, and thereafter recovered judgment for the balance against plaintiff, who was obliged to pay the same. On a prior settlement between plaintiff and the firm the price of the grain was accepted, the firm agreeing to pay the vendor. *Held*, That plaintiff was entitled to recover the money so paid, whether he acted as agent or broker in respect to the purchase.

This action was brought to recover moneys paid by plaintiff, as surety, to defendants' use. In 1868 plaintiff, a grain merchant, purchased of one C., for and at the request of defendants, who composed the firm of S. & Co., a quantity of wheat for cash on delivery. On making such purchase he did not disclose the names of his principals. The grain was delivered and has never been paid for by defendants. In 1868 C. commenced a suit against S. & Co. for the price of the wheat, but was induced to discontinue it upon payment by the respondent of one-third the price of the wheat and a release from C. to him of his individual liability in accordance with the provisions of the joint debtors act. The debt not having been paid in 1873 C. brought an action against plaintiff in which he recovered a judgment for the balance unpaid, which he was obliged to pay, and he brings this action to recover back the money paid by him. The evidence shows that about the time of his purchase plaintiff sued defendants to recover

upon a general balance of account, which included the purchase price of the wheat in question. That suit never proceeded to judgment but was settled by the parties, the claim now made being expressly excepted from the operation of such settlement, defendants then agreeing as part consideration therefor to pay and discharge the liability to C.

*D. M. Porter*, for applt.

*R. S. Green* and *H. W. Bookstaver*, for respt.

*Held*, That the evidence disclosed a good cause of action in favor of plaintiff by reason of defendants' failure to relieve him from his liability to C.

The court instructed the jury that plaintiff's right to recover in this action depended upon whether he acted as an agent or a broker in respect to the purchase of the wheat.

*Held*, Error; that defendants' liability cannot be affected by the character in which plaintiff acted in purchasing the wheat. He was upon the evidence entitled to recover the amount he had been compelled to pay C. He was, so far as defendants are concerned, a person who had incurred a liability for their benefit, and from which it was their duty to relieve him. 22 N. Y., 389.

An agent who on a purchase does not disclose the name of his principal to the vendor, at the time of such purchase, becomes personally liable to the vendor for the purchase price. Upon discovering the name of the prin-

cipal the vendor may also hold the principal responsible for the price of the property bought, provided he has not in the meanwhile in good faith paid such price to the agent. 71 N. Y., 348.

Judgment of General Term, affirming judgment on verdict for defendant, reversed, and new trial ordered.

Opinion by *Ruger*, *Ch. J.* All concur.

## CORPORATIONS. TRUSTEES. REVIVOR.

### N. Y. COURT OF APPEALS.

*Stokes*, *applt.*, v. *Stickney* et al., *respts.*

Decided June 17, 1884.

An action against a trustee of a manufacturing corporation to enforce his statutory liability to creditors of the company by reason of a failure to fill an annual report does not survive the death of such trustee, and cannot be revived against his personal representatives.

This action was brought under section 12 of Chapter 40 of the Laws of 1848, to enforce the statutory liability of defendants as trustees of a corporation organized under said act for a failure to file the annual report required by statute. Since the commencement of the action L., one of the defendants, has died. A motion was made to revive and continue the suit against his executors. It was denied by the Special Term, and the order denying it was affirmed by the General Term.

*Christopher Fine*, for applt.

*Horace W. Fowler*, for respts.

*Held*, No error; that such an action is governed by the statutory limitations applicable to actions to recover penalties, 35 N. Y., 412; that such actions are penal in character and not in any respect based upon the theory of affording compensation to the injured party for damages sustained by reason of the act complained of. 64 N. Y., 173; 65 id., 152; 80 id., 610; 83 id., 156; 86 id., 613. Such actions may be classed among those usually designated *ex delicto*, and which at common law were extinguished by the death of the *tort feasor*. Not being such a cause of action as would survive at common law, it could only be maintained against executors or personal representatives by bringing it within the provisions of the statute authorizing the survivorship of certain actions for torts. This is not such an action. They embrace only those brought to recover damages for wrong done to the property rights or interests of another. 3 R. S., 6th ed., 448, § 1. Section 2 of 3 R. S., 6th ed., 448, m. p., which excepts actions of slander, libel, assault and battery, and others from the operation of section 1, does not purport to enumerate any actions except those which would otherwise be included within the language used in section 1, and does not enlarge the meaning of the language of that section. The right to the penalty under section 12 of the Act of 1848, Chap. 40, is assignable. The cause of action is not one arising out of contract.

Order of General Term, affirming order of Special Term denying motion, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

## APPEAL PRACTICE.

### N. Y. COURT OF APPEALS.

*In re* will of Smith.

Decided June 24, 1884.

Section 2588 of the Code, if applicable to appeals to the Court of Appeals in probate cases, applies only to reversals on questions of fact; it has no application to a reversal on questions of law.

There was a reversal in this case for errors in the admission of evidence, and not upon any question of fact. A motion was made for the framing of issues under Section 2588 of the Code of Civil Procedure.

*J. Newton Fiero*, for motion.

*A. Schoonmaker*, opposed.

*Held*, That the motion should be denied. If said section of the Code applies to appeals in probate cases to this court, it has no application to a reversal on questions of law, but only when the reversal is upon a question of fact.

Motion denied.

*Per curiam* opinion. All concur.

## TENANTS IN COMMON. APPEAL. REFERENCE.

### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Mary McAlear, *respt.*, v. Annie E. Delaney et al., *appls.*

Decided May, 1884.

Where one of several tenants in common is in occupation of the premises he is not chargeable with rent but must pay interest, taxes and ordinary repairs.

Where an appeal from an interlocutory judgment is dismissed, such dismissal is not equivalent to an affirmance of the judgment; and an appeal from the final judgment will still bring up for review the interlocutory judgment.

A referee, appointed in partition to take proof, &c., is bound by the pleadings and cannot find the interests of the parties to be otherwise than as stated and admitted in said pleadings.

Plaintiff and defendant Delaney purchased premises for \$1,000 and took a deed in the ordinary form. They paid \$800 and gave a mortgage for \$200. Of the \$800 plaintiff paid \$550. In this action of partition the complaint alleged that each was seized of one-half. It then stated the amount paid by plaintiff for the purchase price and for other expenses beyond one-half and asked that plaintiff be allowed the overpayment on the sale. The answer admitted that each party was seized of one-half but denied overpayment and alleged that plaintiff had received certain rents. An interlocutory judgment was entered by which the referee found the parties entitled to share in the proceeds, the plaintiff thirteen-twentieths, the defendant seven-twentieths, basing this calculation on the amount paid by each. Defendant appealed from the interlocutory judgment and the appeal was dismissed for want of prosecution. This appeal is from the final judgment.

*J. E. Newburger*, for appls.

*A. M. Murphy*, for resp't.

*Held*, That a dismissal of the appeal was not, within Code § 1350, an affirmance of the judgment; and that under § 1316 the notice of appeal brought up for review the interlocutory judgment. The notice of appeal states that defendant appeals from the referee's report and findings and order decreeing a sale. By this latter phrase is probably meant the interlocutory judgment.

The referee had no right to find the rights of the parties different from the statement of them in the pleadings. There was no issue on that point and he was not a referee to try any issue.

It appears that plaintiff has been in occupation since the purchase. Such a tenant in common is not chargeable with rent. On the other hand she is bound to pay repairs, interest and taxes. By repairs is meant ordinary repairs, not improvements.

Judgment modified by certain small items of interest, taxes and repairs, and as modified affirmed without costs to either party.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### LIBEL.

N. Y. COURT OF APPEALS.

*Purdy, resp't.*, v. The Rochester Printing Co., *applt.*

Decided June 24, 1884.

A publication in a newspaper in relation to one who was in fact a physician, charging that he, as coroner, had held an in-



quest on a man, supposing him to be dead, when he was in fact alive, and that the man would have been pronounced dead, and buried alive, but for the arrival of a physician on the scene, is not libellous *per se* where the article only refers to the coroner in his capacity as such officer and not as a physician.

Reversing S. C., 18 W. Dig., 419.

This was an action for libel. The plaintiff was a practising physician and surgeon and also one of the coroners of Seneca County. The alleged libel consisted of an article in the newspaper printed by defendant, representing that plaintiff, as coroner, had held an inquest on a man supposing him to be dead, when he was in fact alive, and that the man would have been pronounced dead and buried alive but for the fortunate arrival on the scene of another physician, who discovered that the man was alive and succeeded in resuscitating him. The complaint charged the publication with innuendoes to the effect that it was made of and concerning him in his profession of a physician and in his office of coroner. In the article plaintiff was referred to only in his capacity as coroner, and exhibited a prompt and efficient performance of his duties as such. Plaintiff's counsel conceded that no paragraph, phrase or particular portion of the article could be pointed to as libelous.

*John Van Voorhis*, for applt.

*Peter H. Van Auker*, for respt.

*Held*, That the article was not libelous. 1 Johns. Cas., 130; 1 Den., 250.

*Sanderson v. Caldwell*, 45 N. Y., 398, distinguished.

Order of General Term, reversing judgment on verdict directed for defendant and granting new trial, reversed, and judgment absolute for defendant on stipulation.

Opinion by *Danforth, J.* All concur.

## DRAFTS.

### N. Y. COURT OF APPEALS.

*Duffield, applt.*, v. *Johnston, respt.*

Decided June 24, 1884.

An order drawn by a contractor on the owner of the building, payable when certain work is completed, and accepted by such owner is not a bill of exchange, but only operates as an assignment of what would become due to the contractor, or as a contract on the part of the owner to pay the sums mentioned in the order and on the terms specified.

Before the specified work was completed the contractor became unable to perform and the contract was cancelled. *Held* That as to the payments which were to be made after such work was completed the order never operated as an assignment and that defendant, the owner, lost no right by cancelling the contract.

This action was brought to recover the last two payments on an instrument dated Dec. 21, 1878, addressed to defendant, in which he was requested to pay to plaintiff \$666 when the brown stone work on eight houses of his should be topped out, (2) \$400 when the stoops of said eight houses were set, (3) \$375 when the brown stone work of said eight houses should be completed. This instrument was signed by one C. and across its face was written the word "accepted," under which defendant signed his name. It

appeared that on Nov. 5, 1878, C. agreed with defendant to furnish and set the brown stone work for said eight houses. Plaintiff was a dealer in brown stone, and C., desiring to purchase them of him to perform his contract, to secure him for stone furnished drew the order, and procured its acceptance by defendant, and delivered it to plaintiff. Thereafter C. procured stone of plaintiff, some or all of which he used in said houses, but never fully completed his contract. He so far performed it that the first payment of \$666 became due and defendant paid it to the plaintiff. C. did not set all the stoops and having become wholly unable to complete this contract it was cancelled by him and defendant, and the latter procured the stone work on the houses to be completed at his own cost.

*I. T. Williams*, for applt.

*Arthur Hurst*, for resp't.

*Held*, That plaintiff was not entitled to recover; that the order in suit was not a bill of exchange as it was not absolutely payable, 6 Cow., 108; 5 Den., 444; 27 Barb., 181; 15 N. Y., 425, being only payable in case the work was done as specified; that as it does not purport upon its face to be founded upon any consideration none can be presumed, and it was necessary for plaintiff to prove the consideration upon which it was given. It could only operate as an assignment to plaintiff of what should become due to C. from defendant, or as a contract on the part of defendant to pay plaintiff the sum mentioned in the order

and on the terms specified. As to the two sums last mentioned in the order it never operated as an assignment because C. never earned them and they never became due.

*Also held*, That defendant deprived himself of no rights by cancelling the contract with C.

Order of General Term of Court of Common Pleas, reversing judgment of General Term of Marine Court affirming verdict for plaintiff, reversed, and judgment absolute for defendant on stipulation.

Opinion by *Earl, J.* All concur.

### EJECTMENT. DEFENCE. OUSTER.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Ellen Henderson, *resp't.*, v.  
James Scott, *applt.*

Decided April, 1884.

The defence of a former recovery must, since the Code, be specially pleaded.

A defendant in ejectment cannot recover for improvements made by him after express notice of plaintiff's claim and after he has claimed to hold in exclusion of it.

Conveyance of the whole premises by a tenant in common of a portion thereof to a grantee who claimed to own the whole under that deed, was an ouster of plaintiff, who claims one undivided seventh.

Appeal from judgment at Circuit and from order denying motion for new trial on the minutes.

Action for mesne profits after recovery in ejectment.

In the ejectment suit the referee found that plaintiff was not entitled to recover any portion of the value of the use and occupation

of the premises, because not claimed in the complaint. Defendant claims that judgment as a bar to plaintiff's claim herein, but this defence was not specially pleaded. Defendant was asked, as a witness, in his own behalf, "Have you, since you have been in the possession of these premises, made any improvements on the property?" Plaintiff's counsel objected to the question, and the trial Judge said "That question can be raised when they fix the time. Of course it must be what improvements he has made prior to 1878. For the present I will sustain the objection." Defendant's counsel excepted but did not modify the question or renew it in any form. The referee found, in the former suit, that on February 2, 1878, plaintiff demanded of defendant one undivided seventh of the premises, and that defendant refused to give her possession of any part, denied her right to any portion, and claimed to own the whole. Defendant proved that one H., who originally owned five undivided sevenths of the premises, as tenant in common with plaintiff, in 1863, conveyed the entire premises to one L., who mortgaged them to one A., and on foreclosure of the mortgage they were conveyed to one C, who, in 1868, with others, conveyed them by warranty deed to defendant.

*B. B. & G. N. Burt*, for applt.

*J. A. Hathway*, for resp't.

*Held*, The defence of a former recovery may have been admissible in an action like this, under the general issue, prior to the Code, 2

Hill, 478; 4 Barb., 457; but since the Code it must be specially pleaded. Old Code, § 149; New Code, § 500; 16 N. Y., 297, 307; 1 E. D. Smith, 17; S. C. affd., 12 N. Y., 9; 35 Barb., 298.

Defendant could not recover for improvements made by him after he was expressly notified of plaintiff's claim and claimed to hold in exclusion of it, and as the question by defendant's counsel was not limited to improvements made before that time it was properly excluded.

An ouster of the plaintiff was proved. 9 Cow., 530; 46 N. Y., 182.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## SELLING OBSCENE PICTURES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People, *respls.*, v. August Muller, *applt.*

Decided March 28, 1884.

Upon the trial of an indictment under § 317 of the Penal Code for selling obscene and indecent pictures the question as to whether the pictures are indecent and obscene is a question to be determined by the jury from an inspection of the pictures, as one person is as competent to determine such a question as another.

Upon such trial the exclusion of evidence of the sale by other persons, and the exhibition elsewhere of pictures of a somewhat similar character is proper, as such evidence is immaterial.

Appeal from a judgment of the Court of Oyer and Terminer of

the City of New York, convicting defendant of misdemeanor in selling obscene and indecent pictures.

Upon the trial there was no dispute with respect to the sale of the pictures, and the jury were allowed from an inspection of the pictures to determine whether or not they were indecent and obscene.

Evidence on behalf of defendant was offered and excluded, tending to show the sale of pictures of a somewhat similar character by other persons, and the exhibition of similar pictures elsewhere.

*John D. Townsend*, for applt.

*John Vincent*, for respts.

*Held*, That the jury were properly allowed to determine from an inspection of the pictures as to whether they were indecent and obscene. The statute does not define what is an indecent and obscene picture, and the words used are to be understood in their ordinary sense, as being pictures offensive to chastity and delicacy, impure, and tending to excite libidinous and lustful thoughts and emotions, and one person is as well able to determine such a question as another. 3 Q. B. 360; *U. S. v. Bennett*, U. S. Circ. Ct. Repts. Op. by Blatchford, J.

Evidence of the sale of pictures of a similar character by other persons, and the exhibition of such pictures elsewhere, was properly excluded. Such evidence was immaterial. It did not tend to exculpate defendant, nor have any bearing upon the question at issue.

As to the abstract propositions which the Court refused to charge, and to which refusal exception was taken, it is sufficient to say that they had no such bearing upon the evidence in the case as to require them to be charged as requested.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

### TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Annie Cooke Lawrence, by guardian, *applt.*, v. Sarah L. Cooke, *respt.*

Decided March 7, 1884.

The sixth and seventh clauses of the testator's will were as follows: "*Sixth*: The residue of my estate, both real and personal, \* \* I give, devise and bequeath to my daughter, Sarah L. Cooke, to have and to hold the same unto her and her heirs and assigns forever. *Seventh*: I commit my granddaughter, Annie C. Lawrence, \* \* to the charge and guardianship of my daughter, Sarah L. Cooke, in whose honesty, good will and integrity I repose the utmost confidence. I enjoin upon her to make such provisions for said grandchild, out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." *Held*, That a trust was created in favor of Annie C. Lawrence as a burden upon, or condition of the enjoyment of the residuary estate of Sarah L. Cooke.

Appeal from judgment of Special Term dismissing complaint.

This action was brought to obtain a construction of the will of

Chancey L. Cooke, deceased, the grandfather of plaintiff. The dispute was predicated of the sixth and seventh clauses of the will, which were as follows :

"*Sixth*:—The residue of my estate, \* \* 1 give, devise and bequeath to my daughter, Sarah L. Cooke, to have and to hold the same unto her and her heirs and assigns forever.

"*Seventh*:—I commit my granddaughter, Annie C. Lawrence, \* \* to the charge and guardianship of my daughter, Sarah L. Cooke, in whose honesty, good will and integrity I repose the utmost confidence. I enjoin upon her to make such provisions for said grandchild, out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate."

It was contended, on behalf of plaintiff, that a trust was created by the seventh clause, its language amounting to an injunction and command that the grandchild therein named should be provided for.

*Luke A. Lockwood and Henry W. Johnson*, for applt.

*W. R. Darling*, for respt.

*Held*, That in considering such a question the first and paramount rule to be applied is to ascertain, if possible, the intention of the testator. 1 Perry on Trusts, § 114; 1 Story's Eq. Jur., § 1068; 1 Jarman on Wills, 332; 2 Redfield on Wills, 415, 421.

That the seventh clause of testator's will, considered with reference to his manifest intention, meant that provision should be made out of the residuary estate by defendant for the support of plaintiff, and that not only was such the intention, but the words employed in said clause were imperative and created a trust for that purpose, as a burden upon or condition of the enjoyment of the residuary estate, to which it belonged and of which it immediately became a part, the residuary estate and the trust being created at the same moment. 2 Bro. Ch. Ca., 38; 1 Atk., 469; 16 Jur., 492; 3 Meriv., 437; 3 Sandf., 555.

1 Sim., 542; 11 Clark & Fin. App. Cases, 513, H. of L.; 9 Sim., 319; L. R., 10 Eq. Cases, 267; 18 Beav., 372; 3 Sm. & Gif., 280; 5 Mad. Ch., 434; 14 Sim., 379; 3 Irish Rep. Eq., 629; 4 Irish Ch. Rep. N. S., 1; 11 Irish Rep. Eq., 219; 5 Irish Rep. Eq., 373; 2 Drewry, 221; 1 Brown's Ch., 179; 10 Weekly Notes, 18; 114 Mass., 66; 17 John., 280; 70 Penn. St., 153; 19 Conn., 342; 21 Conn., 256; 20 Penn. St., 268; 15 Ala., 296; 5 Florida, 51; 82 N. Y., 405; 1 T. & C., 211; 81 N. Y., 356; 14 W. Dig., 206, distinguished.

Judgment reversed and judgment rendered for plaintiff.

Opinions by *Brady* and *Daniels, JJ.*; *Davis, P. J.*, dissented, on the ground that the nature and force of the language used by testator in the seventh clause of his will was not such as to impose any specific trust upon the absolute estate he had given his daughter

by the sixth clause of his will; that, on the contrary, it indicated very strongly his intention to confide wholly in the sense of justice and right of his daughter to do what she might think best for the granddaughter, leaving that sense wholly free from legal trammel or constraint.

### NEGLIGENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Benjamin Brouk, *respt.*, v. The Boston & Albany Railroad Co., *applt.*

Decided May, 1884.

Where the evidence as to whether the statutory signals were given is conflicting, the question is one for the jury to determine. Where plaintiff testified that he saw the engine standing still outside the highway, and heard no warning until too late to avoid the accident, *Held*, That the question of contributory negligence was one of fact for the jury.

Appeal from judgment entered upon verdict, and from an order denying a new trial on the minutes.

The action was brought to recover damages for injuries sustained by the plaintiff in consequence of the defendant's negligence, whereby the defendant's locomotive and the plaintiff's wagon came in contact and the plaintiff was thrown out of his wagon.

The evidence given by plaintiff tended to establish negligence on the part of defendant, because of the running of its engine upon plaintiff when crossing its track in a public highway without signal

or warning of danger. On the other hand defendant's servants, who were on the engine, testified that the usual signals necessary and proper to be given at crossings were given, and so soon as the plaintiff's situation was observed all possible means were used to prevent injury.

The plaintiff recovered a verdict of \$1,500.

*John Cadman*, for *applt.*

*Andrews & Edwards*, for *respt.*

*Held*, That on this condition of the proof the judge properly submitted the question to the jury whether warning was given such as would have guarded plaintiff against accident in approaching the crossing had he done so with reasonable care.

The jury having found a verdict for plaintiff,

*Held*, That the question of defendant's negligence was foreclosed by the verdict.

It was claimed that plaintiff was not free from fault, but was in fact guilty of contributory negligence.

*Held*, That this question, also, was for the jury, under the evidence.

Plaintiff testified that he saw, as he approached the crossing, the engine standing still, outside the line of the highway and about sixty-one feet from the place of collision. He was then distant from that point about forty-four feet; that after this he neither saw or heard any indication of danger until he was on, or nearly on the track, when he saw the engine approaching and nearly upon him;

that it was then too late to avert accident. He testified "I thought there was no danger, because it (the engine) was standing still, and I drove on." There was also evidence tending in a general way to corroborate the plaintiff's statement.

*Held*, That the question became one of fact, upon the proof, whether the plaintiff, in proceeding to make the crossing, acted with reasonable care and prudence, and that the judge was right in submitting the case to the jury on this question.

That the case came within the reasoning of the court in *Eaton v. Erie R. Co.*, 51 N. Y., 514, 551, and in *Maginnis v. N. Y. Cen. &c., R.R. Co.*, 52 N. Y., 215, 260-1.

Judgment and order affirmed, with costs.

Opinion by *Bockes, J.*; *Boardman, J.*, concurs; *Learned, P. J.*, not acting.

#### SET-OFF.

##### N. Y. COURT OF APPEALS.

*Newcomb, recr., respt., v. Almy, applt.*

Decided June 17, 1884.

An insurance company issued certain paid up endowment policies on defendant's life, but failed before they became due and payable. At that time it held a past due note of defendant's and a claim against him for money had and received. In an action by the receiver, on such note and claim, *Held*, That the whole reserve value of the policies was not, at the time of plaintiff's appointment, due defendant in such sense that he could offset it; that it was not a case of mutual credits within the meaning of 2. R. S., 47, § 36.

On Dec. 7, 1871, the Atlantic Mut. Ins. Co. issued upon the life of defendant a paid up endowment policy, by which it agreed to pay M. A. A. \$1,454 if defendant died before Dec. 7, 1880, or if he was living at that time to pay such sum to him. On the same day it issued another paid up endowment policy for \$2,240 upon defendant's life for the term of fourteen years and the company agreed to pay the amount insured to M. A. A. upon the death of defendant, or in case he lived until Dec. 7, 1885, to pay the amount to him. Plaintiff was appointed receiver of said company in August, 1877, at which time the reserve value of said policies was \$2,779.95. The company at that time held a past due note of defendant for \$2,000, and he was also indebted to it for \$226.31, for money had and received. Plaintiff seeks to enforce payment of the note and the money had and received, and defendant claims to offset the reserve value of the two policies.

*Rufus W. Peckham*, for applt.

*Charles J. Buchanan*, for respt.

*Held*, That at the time plaintiff was appointed receiver the whole reserve value of the two policies was not due defendant in such a sense that he could avail himself of it as an offset. 22 N. Y., 489; 37 id., 396. This is not a case of mutual credits between the Ins. Co. and defendant within the meaning of 2. R. S., 47, § 36.

Judgment of General Term for plaintiff on case submitted affirmed.

Opinion by *Earl, J.* All concur, except *Rapallo, J.*, not voting.

— — —  
CONSIDERATION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Maretta L. Stebbins, *respt.*, v. William Breese, *applt.*

Decided May, 1884.

Plaintiff, who was in possession of certain premises under a contract to purchase of defendant, being in default in his payments it was agreed between the parties that the contract should be cancelled, possession surrendered to defendant and that in consideration thereof defendant should pay to plaintiff whatever the premises should sell for over the contract price. *Held*, That there was a good consideration for the agreement and that these premises having been sold plaintiff was entitled to recover the difference between the amount due on the contract and the price for which the premises were sold.

Whether simultaneous conveyances of lands by two persons to each other were intended as sales for money or as a mere trade or exchange of lands is a question of fact for the jury.

A statement in a deed of a sale for a named consideration duly paid is an admission in writing by the grantor and *prima facie* evidence that the premises were sold for the price named, and that he had been paid such sum on the sale.

Appeal by defendant from a judgment rendered on the verdict of a jury, and from an order denying a motion for a new trial, made on the minutes of the court.

Action for breach of contract. Plaintiff held a contract of purchase with defendant, dated Sept. 25, 1875, by which the latter agreed to sell and convey to the former the premises therein de-

scribed, for the consideration of \$2,496.50, to be paid one year from that date, with interest; the deed to be delivered on the plaintiff's performance of the agreement. It was therein stipulated that in case of the non-performance of the contract by the plaintiff, it should be void, and that the defendant might then re-enter and have possession. Plaintiff took possession of the premises under the agreement, and continued such possession until Jan. 24, 1877, but paid no part of the purchase price. On that day the parties agreed upon a cancellation of the contract of purchase, and for the surrender of possession to defendant, in consideration of which defendant executed and delivered to plaintiff an agreement under seal—agreeing that when said premises were sold by him he would pay to plaintiff all sums of money which he should sell the same for, over and above the amount called for by the original contract, with interest, taxes etc., which he might be compelled to pay prior to such sale. Defendant resumed possession, and on the 24th of October of the same year, he conveyed the premises by warranty deed to D. at a consideration therein expressed of \$3,500. Plaintiff recovered a verdict for the amount claimed.

*George W. Ray*, for *applt.*

*A. F. Gladding*, for *respt.*

*Held*, That plaintiff was entitled to recover on the agreement of Jan. 24, 1877, the difference between the amount due defendant, estimated according to the provisions of the original contract of



Sept. 25, 1875, and \$3,500, the consideration of the conveyance to D.

That the agreement of Jan. 24th was not void for want of consideration. That plaintiff being in possession under the contract of purchase when the agreement of Jan. 24 was made, and defendant having recognized its validity by contracting for its cancellation and with restoration of possession of the premises thereby agreed to be conveyed, there was an admission of the existence of plaintiff's equitable right under the contract, and peaceful surrender of possession was proffered by one party and accepted by the other.

That there was, therefore, as a consideration for defendant's promise, a surrender by plaintiff of an admitted right, and the obtaining and acceptance of benefit and advantage by defendant, which was a good and sufficient consideration for the new and substituted agreement between the parties.

*Also held*, That there was no well grounded objection to the validity of the contract for want of mutuality.

It appeared that the premises were conveyed by defendant to D. simultaneously with the conveyance of other premises to him by the latter. The consideration of defendant's conveyance to D. was \$3,500, and of D's. conveyance to defendant, \$4,000; the latter paying to the former \$500 boot-money. It was claimed that the transaction was a mere trade or exchange of lands, and not a *sale* by defendant of his premises within the meaning of the agreement; and

that plaintiff, to recover, was bound to show a sale for money.

*Held*, That the transaction between defendant and D. might be examined into in order to see what was agreed upon by them as to the consideration of the premises conveyed. And that the question of fact was properly left to the jury to determine.

The deed from defendant to D. stated a *sale* of the premises at a consideration of \$3,500 *duly paid*.

*Held*, That this was an admission by defendant in writing; and in the absence of all countervailing proof made out the plaintiff's case; it being evident that defendant had sold the premises for money—for \$3,500; and that he had been paid this sum on the sale. But that it was not conclusive of the fact.

Judgment and order affirmed, with costs.

Opinion by *Bockes J.*; *Learned, P.J.*, and *Boardman, J.*, concur.

## ASSAULT AND BATTERY.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Patrick Crowley, *applt.*, v. Robert Miller, *respt.*

Decided April, 1884.

A Roman Catholic priest having charge of a parish under his bishop, in whom is the legal title, has the right to regulate the price and occupancy of pews and to eject from the church parishoners who refuse to comply with the regulations.

Assault and battery. Plaintiff was a Roman Catholic and at-

tended the church of which the Rev. James O'Reilly was priest, acting as representative of the bishop, in whom was vested the title to the property. The church was not incorporated and had no trustees or directors, but was under the exclusive management of the priest. Plaintiff had long occupied pew 55, but had no deed or written lease of it, or any contract relating to it, except that for several years he had paid an annual rent for it. The priest from time to time assessed the pews to raise funds to apply on the church debt, and among others assessed two dollars upon pew 55. Plaintiff refused to pay, and the priest refused to accept any pew rent from him until the assessment was paid.

Plaintiff continued to occupy the pew for two or three years, until January, 1879, when the priest declared all the pews vacant, and plaintiff was notified of it. Subsequently pew 55 was removed, and the priest wrote to plaintiff, offering him pew 89, and saying, "If you wish to pay rent for it you can; if you don't wish to pay rent for it, you may nevertheless occupy it, at least for the present." That was June 1, 1879. On that day plaintiff went to church, taking two chairs, and sat in the vacant space where the pew had stood. He was requested to leave, but instead of doing so he used profane language and loudly demanded back his pew, and for several minutes addressed the priest with violent and opprobrious language. On the next

Sunday, the day of the alleged assault and battery, plaintiff again entered the space left vacant by the removal of pew 55, after having been requested to take pew 89, which he refused to do. Defendant, who was a special policeman and acting under the priest's direction, asked plaintiff to leave pew 55 and go to pew 89. He did not comply, whereupon defendant took him by the collar and used sufficient force to remove him from the pew, and led him along the aisle for a short distance, when he released him, and plaintiff walked out of the church.

*W. P. Goodelle*, for aplt.

*Louis Marshall*, for resp't.

*Held*, That the priest did not exceed his powers, which are, in this country, peculiar to the Roman Catholic church; but in the established church in England, the parson, under the ordinary, had the same power at common law. 3 Hill, 26.

As there was no promise on plaintiff's part to pay the assessment it could not have been collected from him by action at law. 10 Johns., 217; 34 Barb., 16. But his refusal to pay on reasonable demand terminated his right to occupy the pew. There is no evidence of the use of excessive force in removing plaintiff.

The testimony elicited on cross-examination of plaintiff as to his conduct on the first two Sundays was rightfully admitted, as it bore upon the question of defendant's justification.

Parol proof of the contents of the priest's letter to plaintiff was

competent. The letter was collateral, and the only material fact it tended to prove was shown by other competent evidence.

Judgment affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### GIFTS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Amelia Smither, *respt.*, v. Elias L. Bissell et al., *appls.*

Decided April, 1884.

A gift *inter vivos*, perfected by delivery of a deed of gift, is complete, although made without consideration. And a written assignment of securities without delivery thereof is a sufficient declaration that the assignor holds the same in trust for the assignee.

Appeal from judgment on Special Term decision in equity.

Action to foreclose a mortgage executed by defendant E. L. Bissell, and to cancel a discharge thereof.

The trial judge found that on Aug. 21, 1878, the mortgagee executed and delivered to plaintiff an assignment as follows: "For value received, I hereby assign, transfer and convey to my daughter, Amelia Bissell," (this plaintiff), "all my right, title and interest to and in the within mortgage and accompanying bond, to be used by her for exclusive and personal benefit. Lancaster, August 21, 1878." (sd.) "Elias Bissell." That at that time the bond and mortgage in suit were present, and they are the securities referred to in said assignment,

but the latter was never attached to them, and at the time of the assignment Elias Bissell owned the same and had full right to assign them and give a good title thereto, and they were produced by the assignor and exhibited to the assignee, who took them into her hands and inspected them; that the assignor retained possession of the securities, keeping them in a drawer to which plaintiff had access, and where she saw them at times during the two months following the assignment, but that she did not, after the assignment and during her father's life, have actual possession of said bond and mortgage, or collect or receive anything thereon, but that after said assignment and during said assignor's lifetime the mortgagor paid him certain sums which the court held should be allowed in payment of said bond and mortgage. The court also found that said assignment was executed in consideration of love and affection only, and as a gift, and that said written assignment was delivered with the intent of transferring to plaintiff the absolute title to the bond and mortgage. Defendants put in evidence a writing signed by plaintiff, dated Aug. 13, 1877, by which, in consideration that her father had assigned to her said securities and also another bond and mortgage, she agreed not to assume any ownership or control over said bonds or mortgages during her father's lifetime, but that he might use the payments made the same as if the assignments had not been made.

The court found that said last mentioned instrument having been executed prior to the assignment the latter was not subject to the terms of said instrument, and the same was not a part or counterpart of said assignment. He also found that on May 12, 1879, Elias Bissell executed to Elias L. a discharge of said securities, which was recorded, and that before the execution thereof Elias L. had notice of plaintiff's ownership of the bond and mortgage and of said assignment. The court found that said mortgage is a valid and subsisting lien in plaintiff's hands for the amount unpaid upon it, and that plaintiff is entitled to judgment cancelling the discharge and for a foreclosure of the mortgage.

*Adelbert Moot*, for applts.

*C. F. Tabor*, for resp't.

*Held*, No error. The written assignment passed the title, as between the parties to it, without a delivery. Where a gift *inter vivos* is perfected by delivery of the thing, or *delivery of a deed of gift*, it is complete, although made without consideration. 48 Barb., 581, 590. And the written assignment was a sufficient declaration that the assignor held the securities in trust for plaintiff. *Id.*, and cases cited by Gilbert J., p. 591; 14 Hun, 478, and cases cited, p. 480.

Judgment affirmed, with costs.

Opinion by *Smith, P. J.*; *Har- din* and *Barker, JJ.*, concur.

## PLEADING. MISJOINDER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Walter J. Welch, *applt.*, v. Edward C. Platt, *resp't.*

Decided March 28, 1884.

When the facts set forth in the complaint are sufficient to constitute and do constitute but a single cause of action, a demurrer to the complaint of a misjoinder of causes of action will not be sustained because the facts in the complaint are divided and a portion set forth as a second cause of action. Such division does not make two causes of action of the facts which constitute but one.

Appeal from order sustaining a demurrer to the complaint.

The complaint set forth a usurious loan of money, and the execution and delivery of a chattel mortgage to secure the loan, and alleged it to be void on that ground, and that it should be surrendered up and cancelled. The complaint then alleged, as a second cause of action, that plaintiff was the owner of certain personal property included in the mortgage, and that defendant, without process of law, wrongfully took this property from the possession of plaintiff and unjustly detained it, to the damage of plaintiff in \$3,000.

*W. J. Hardy*, for applt.

*William Wheeler*, for resp't.

*Held*, That these facts present but a single cause of action, and that is for the taking and conversion of the property. The action has been brought solely for that, and the relief demanded is for the recovery of its value. The allegations with respect to the usuri-

ous loan and chattel mortgage are equivalent to the allegation that plaintiff is owner of the property and discloses plaintiff's title. 41 N. Y., 107; 14 Hun, 52.

The division of the complaint mentioned does not make two causes of action of the facts which create but one.

The appeal from the order sustaining demurrer was regarded and considered by consent of counsel as an appeal from an interlocutory judgment, as the appeal from the order could not regularly be heard under the provisions of the present code.

Order and judgment reversed, and judgment on demurrer ordered for plaintiff, but as the complaint was so framed as to invite the demurrer served on behalf of defendant the costs of the appeal should abide the event of the action, with leave to defendant to answer in twenty days on the usual terms.

Opinion by *Daniels, J. ; Davis, P. J.*, and *Brady, J.*, concur.

#### SLANDER. EVIDENCE. DAMAGES.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Jennie E. Sturges, *respt.*, v.  
John Wiltsie, *applt.*

Decided May, 1884.

In an action of slander for imputing unchastity to a female where the defences were justification and mitigating circumstances, *Held*, That a married woman might testify that plaintiff's physical appearance was that of a pregnant woman; that the wit-

ness was competent and the evidence proper in mitigation.

The answer set up in mitigation many facts which tended to show that defendant had grounds for believing the truth of the charge, and much evidence was given on the trial by defendant's witnesses in regard to these facts. *Held*, That under Code, § 585, it was proper for defendant to plead the facts, and that as he had given some evidence to support them, it was error in the court to charge that if defendant set up these facts without knowing that he would be able to prove the truth of them the jury might take that circumstance to augment plaintiff's damages.

This was an action of slander for imputing unchastity to an unmarried woman. The answer, besides pleading a justification, set up in mitigation many facts which tended to induce in plaintiff's mind a belief in the charge made by him, e. g., that she appeared to be pregnant and exhibited indications of that condition. On the trial a married woman, a witness for defendant, was asked whether plaintiff appeared physically as women do when in that condition. The question was excluded. Plaintiff recovered \$4,500.

*E. D. Wagner*, for applt.

*F. R. Gilbert*, for respt.

*Held*, That the evidence was proper. The witness was competent, having borne children. In *People v. Eastwood*, 14 N. Y., 162, it was held proper to ask for the opinion of a witness whether a person was drunk. So in *Blake v. People*, 73 N. Y., 586, evidence was allowed that the grasp of one man by another was friendly. The reason of these decisions must be that the appearance of a person consists of many particulars, some of which would be very difficult of

description. This evidence was proper not only in justification but also in mitigation. If plaintiff's shape, &c., were such that women of experience would testify that she appeared like a pregnant woman, such evidence, even admitting that defendant's utterances were untrue, would go to excuse them.

We think there was also error in the charge. Certain matters were alleged in mitigation, among them circumstances which might tend to show intercourse with a certain man, pregnancy and the subsequent birth of a child. On the other hand the man was a witness and denied the charge, and a physician gave testimony which might account for the change in plaintiff's size and appearance from causes in no way affecting her character. On this evidence the court charged that if a defendant sets up a justification without knowing that he will be able to prove it, and without exercising ordinary care in ascertaining the truth; if he does it carelessly and recklessly, in bad faith, with a view to harrass the plaintiff, it may be taken by the jury to augment the damages. The Code, § 535, provides that in an action for slander defendant may prove mitigating circumstances, notwithstanding he has pleaded or attempted to prove a justification. And it seems proper to plead the facts which are to be shown in mitigation. This was all that defendant did. It is unjust to say that at the peril of increased damages the defendant must know in advance

whether, on the whole evidence, the jury will find a justification, or only a mitigation. In *Dix v. Rose*, 69 N. Y., 122, the court, referring to this provision, which was much the same under the Old Code, said that when there was a total failure of proof in this direction and the circumstances evince malice in reiterating the slander in the pleadings, the jury might take that circumstance into consideration. But in this case there was not a total failure of proof, but on the contrary considerable evidence. This is very important on the question of malice.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

### ESTOPPEL.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Alida F. Flint, applt., v. Calvin H. Bell and James E. Beller, respts.*

Decided May, 1884.

One Dorman in 1861 made a general assignment and made plaintiff a preferred creditor. The assignee, as such, paid out more money than the value of the real and personal estate and paid all D's debts except plaintiff's. The assignee took possession of the real estate and remained in possession until 1879. In 1876 he deeded the real estate to the defendant Bell, to whom he was indebted. Plaintiff knew this conveyance was to be made and was present when it was made but made no objection and asserted no claim. She had lived on the premises from 1865 to 1878

and was related to Beller and Dorman. In an action by her to assert her claim as a preferred creditor and to have said deed set aside, *Held*, That she was estopped.

Plaintiff was a sister-in-law of one Dorman, who in 1861 made a general assignment to defendant Beller (plaintiff's brother-in-law), preferring plaintiff as a creditor. Beller disposed of all the personal property in paying debts of Dorman and paid out as assignee much more than he had received for the value of personal property and more than the value of the real estate as well. He told plaintiff he would pay her out of the real estate, which consisted of a store. He took possession of the store and so remained until 1879, when this action was commenced. In 1876 Beller, being indebted to defendant Bell, executed to him a deed of the store. This action is brought to set aside this deed as a fraud on plaintiff. The Court found that plaintiff knew of these negotiations between Beller and Bell, which resulted in the giving of the deed, at the time they were made; that she did not object and gave no notice of any claim legal or equitable; that she was present when the conveyance was made and made no objection. Plaintiff lived upon the premises from 1865 to 1878. The case is reported on a former trial in 27 Hun. 155, 15 W. Dig., 30. Defendants had a verdict.

*O. W. Smith*, for applt.

*C. H. Bell*, for respts.

*Held*, That plaintiff was estopped. It appears that she acquiesced in the conveyance, and slight

evidence of that is needed. For it appears that she has known for many years that Beller was treating the property as his own. He has paid out as assignee more than the value of both the real and personal estate which he has received. Plaintiff has for a long time neglected to compel him to discharge the duties of his trust.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

## EXECUTORS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* settlement of the account of Mary Anne Hutchinson, executrix.

Decided March 28, 1884.

An executor may be required to account before the surrogate upon the application of a legatee, creditor, or next of kin, having a demand against the personal estate of the deceased, where no final accounting has been had, although the executor, at the time of being required to account, is no longer holding the estate as executor but as trustee, and such executor may be required to attend before the referee appointed to examine and pass upon the issues raised by objections to the account, and be examined as to his proceedings as such executor.

Appeal by the executrix from an order of the surrogate, requiring her to attend before a referee appointed to examine and pass upon the issues raised by objections to her account and be examined as to her proceedings as such executrix.

The regularity of the proceeding

before the surrogate was attacked substantially upon the ground that the executrix held the estate of the testator at the time as trustee under his will. No objection was made to the proceedings until after the objections to the account had been filed.

*Chas. H. Woodruff*, for applt.

*O. J. Wells*, for resp't.

*Held*, That under the provisions of 3 R. S., 6th Ed., 99, § 63; Code, § 2723, the executrix could be required to account upon the application of any person having a demand against the personal estate of the deceased, either as creditor, legatee, or next of kin. Code, § 2726; 1 Com., 206; 85 N. Y., 561.

By not objecting to the regularity of the proceeding until after the objections to the account had been filed the executrix acquiesced in the regularity of the proceedings, and cannot, therefore, be heard to question their regularity. But, irrespective of acquiescence, the executrix was legally liable to be called upon to give evidence as a witness in support of the objections to her accounts. This right has been secured by § 828 of the Code. It was the duty of the executrix to have appeared and submitted to the examination directed by the order from which the appeal has been taken.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## MANDAMUS. REDEMPTION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William Youmans v. Marcus L. Terry.

Decided May, 1884.

It is error for the court to grant a mandamus under seal upon a motion in an action. Mandamus is now a state writ and should be applied for in a separate proceeding.

Where a judgment creditor wishes to redeem from a sale of real property by a sheriff he must pay the amount bid on the sale with interest. It is not enough to pay the amount due on the judgment under which the sale was had.

An order was granted in this action directing the sheriff to show cause why he should not execute a deed of certain premises to one Neish. Upon the return day the court made an order granting a peremptory mandamus under the seal of the court, requiring the sheriff to execute said deed. It appeared that in June, 1874, plaintiff recovered a judgment in the action above entitled against defendant for \$716.53; by virtue thereof the sheriff, in Oct., 1882, sold the premises to plaintiff for \$1,000 and gave him the certificate. In 1879 defendant brought an action against plaintiff to cancel this judgment, but in Aug., 1883, it was decided therein that there was still due plaintiff on said judgment \$768.55 with interest from Aug. 1, 1883. On Jan. 7, 1884, plaintiff assigned to one Theodore Terry his certificate of sale, but did not assign his judgment in this action. At the same time he assigned to Theodore another judgment



against defendant for \$234.91, being costs in the cancellation suit. Theodore Terry paid plaintiff \$1,000 and discontinued a suit which he had against him. On the same day Neish (who was assignee of a judgment gotten by one Griswold against defendant in 1874) paid the sheriff \$832.07 to redeem from the sale to plaintiff in Oct., 1883. Theodore Terry claims a deed under his assignment of the certificate, regarding the redemption as void, and Neish claims a deed under said attempted redemption. The court decided as above, in favor of Neish. Theodore Terry, who was permitted to come in and defend the motion, appeals.

*Wm. & J. B. Gleason*, for applt.

*Youmans, Adee & Youmans*, for resp't.

*Held*, That the order, in its present form, was improperly granted in any event. A mandamus is what is now called a state writ and issues in the name of the People. It requires a notice of motion or order to show cause why a mandamus should not issue. Code Civ. Pro., § 2070. It must be applied for in a distinct and separate proceeding. Perhaps an order could have been made in this action directing the sheriff to execute the deed, if the moving party was entitled to it. But that was not done.

The redemption attempted by Neish was not effectual. To redeem, the judgment creditor must pay the sum of money which was paid at the sale with interest.

Code Civ. Pro., § 1450. That sum was \$1,000, and Neish's payment was only \$832.07. It is said that in the cancellation action it was decided that there was due upon the judgment a less sum than the original recovery. If this be so we think it does not affect the question. The sale took place in 1882, and the other action, although decided in 1882, was pending when the sale was made. Defendant did not restrain the sale, nor move to have it set aside, or claim that plaintiff should refund to him the amount due on the judgment, or in default surrender to plaintiff the certificate. The certificate remained good, therefore, in the hands of plaintiff and is good in the hands of Theodore Terry, his assignee, even though he be not assignee of the judgment also. The latter's right to a deed could only be defeated by a legal redemption within the statutory time. That was not done.

Order reversed, with costs of appeal under § 3240, and motion denied, with \$10 costs, and the sheriff directed to execute and deliver the deed to Theodore Terry.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concur.

#### APPEAL. TRUSSEES. COMMISSIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* accounting of Peter A. H. Jackson as testamentary trustee.

Decided March 28, 1884.

An appeal from the decree of a Surrogate is only required to be heard upon a case under § 2576 of the Code when the decree appealed from was rendered upon the trial by the Surrogate of an issue of fact.

In case such decree was not rendered upon the trial of an issue of fact an appeal may be brought on without a case under the practice provided for by the latter part of § 998 of the Code.

When by the terms of the will and the decree of the Surrogate a fund is set apart with direction that the same be invested for and the proceeds paid to a beneficiary for life, and at his death such fund was directed to be paid to a legatee named, the executor after setting apart and investing such fund is entitled on the death of the beneficiary to commissions as trustee upon the investment and disbursement of the amount in addition to the commissions previously allowed to him as executor.

Appeal by the trustee from so much of the decree of the Surrogate as charged him with interest and denied him commissions on the settlement of his accounts.

The testator by his will directed his executor to set apart a certain sum and pay the income to C. P. R. during her life and at her death the principal sum to P. B. R. A final decree was made by the Surrogate March 16, 1883, settling the accounts of the executor and allowing him commissions upon the sum named, and such decree directed, following the provisions of the will, that said sum mentioned be set apart and that the income therefrom be paid to C. P. R. during her life and at her death the principal to P. B. R. Such direction was carried out and the fund deposited with the trust company as a separate fund for the purposes named.

On July 19, 1883, C. P. R., the beneficiary, died, and upon the

settlement of his account as to the legacy named the Surrogate declined to allow the executor commissions. The executor was charged with interest on the fund for a period of two months after he was directed to invest it. Objection was taken by the respondent on the appeal that the same was not regularly before the court for the reason that no case had been settled.

*H. M. Collyer*, for applt.

*Jerolomon & Arrowsmith*, for respt.

*Held*, That inasmuch as the decree was not made by the Surrogate on the trial of an issue of fact no case was necessary under § 2576 of the Code. That the practice provided for by § 998 of the Code permitted the hearing of the appeal without a case.

That commissions should have been allowed the executor on this settlement of his accounts as to the legacy aforesaid, the same having been set apart and separately invested under the decree. 88 N. Y., 121; 29 Hun, 622. The case of *Hall v. Hall*, 78 N. Y., 535, does not conflict with this view.

Decree affirmed as to interest, as the fund was only deposited, although ordinarily a longer time than two months would be allowed to make the investment to be made, 55 N. Y., 625; 88 N. Y., 169, and reversed as to commissions which are allowed. Disbursements of appeal only allowed appellant.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## SUPERVISORS. APPEAL. COSTS.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT. \*

The People *ex rel.* John S. Burhans et al., Supervisors of the City of Kingston and the City of Kingston v. The Board of Supervisors of Ulster County.

Decided May, 1884.

Power and duty of a Board of Supervisors in auditing and allowing the costs and expenses incurred by that body in making defence to an appeal taken by the Supervisors of certain towns to the State Assessors under the act of 1859 (Ch. 312), "to equalize the State tax among the several counties of the State" and the amendment of 1880.

What items of "costs and expenses" of such appeal are properly allowable by the Board of Supervisors.

The authority to audit in such a case is conferred upon the Board of Supervisors, not upon the court; and when an audit of the bills for costs and expenses of the appeal has been made by the Board in a regular and orderly manner, such audit is conclusive upon the court upon certiorari to review the action of the Board.

It is not a valid objection to the action of the Board of Supervisors in auditing such bills that the statute under which they act makes them judges in their own case.

Certiorari to the Board of Supervisors of Ulster County to review and correct the action of such Board in auditing the costs and expenses incurred by that body in making defence to an appeal taken to the State Assessors under the Act of 1859, Ch. 312, and the amendment of 1880, Ch. 80, § 15.

The return showed that the relators, in 1882, appealed to the State Assessors from the decision

of the Board in the matter of the equalization and correction of the assessment rolls of the several towns in the county, including those of the City of Kingston. The appeal was sharply litigated, and great expense was incurred in its prosecution and defence. The appeal was finally dismissed on the merits, and in Nov., 1883, the decision of the State Assessors, so adjudging, was made and filed. The bills for the expenses incurred by the Board, itemized and duly verified, were first presented to the Assessors and afterwards to the Board of Supervisors when in regular session, for audit and assessment. The bills were examined and audited according to the ordinary and regular course of business, and their amount to the extent of \$18,337.18, was by the Board assessed and levied upon the City of Kingston, here represented by the relators, the supervisors of that city.

The bills were referred to a committee of three members of the Board, who made a report in writing, returning the itemized bills, abstracted as allowed and certified in their report, and recommending their audit according to the abstracts submitted. The report was considered and the bills were formally, by resolution, audited by the Board to the several parties, and in the amounts specified in the abstracts.

*John J. Linson*, for relators.

*Allon B. Parker*, for respts.

*Held*, That the auditing of the bills was regular and orderly in every respect. That it was for the

Board to determine the right and justice of the claims which went to make up the sum to be allowed for costs and expenses.

That it was for that body to determine, in its discretion and judgment, whether the items set forth in the bills were "costs and expenses" arising from the appeal and connected therewith, and whether they were actually incurred and were right and proper to be allowed in view of the law and the circumstances of the case.

That the term "costs and expenses," used in the statute, were not synonymous with costs and disbursements in an action, but should be construed with reference to the context and the subject matter to which they were intended to apply.

That the law was intended to afford an indemnity or protection against the cost and expenses of the defence, of whatever nature they might be, provided they arose out of, or from, or were connected with the appeal, and were actually incurred, and were fair and just in amount.

Certiorari and proceedings thereon dismissed, with \$50 costs and disbursements against the relators, under § 2143 of the Code of Civil Procedure.

Opinion by *Bockes, J.; Learned, P. J., and Boardman, J.*, concur.

## SURETYSHIP. GUARDIANS.

### N. Y. COURT OF APPEALS.

Dodge, an infant, *respt.*, v. St. John, *applt.*

Vol. 19—No. 12a.

Decided June 10, 1884.

A surety on a bond for faithful performance of duty by a special guardian and that he shall pay over, &c., according to the order of the court, cannot, to escape liability, assail the proceedings under which his principal received the moneys which he refuses to pay over. The order of the court directing their payment is conclusive on the guardian and measures the liability of the surety.

The omission of a penalty in such a bond does not affect its validity, but makes the liability commensurate with the condition.

This was an action upon a bond executed by defendant on the appointment of T., special guardian of plaintiff, in proceedings for the sale of her real estate. Defendant undertook that T. should faithfully perform the trust reposed in him as guardian, and "pay over, invest and account for all moneys and securities received by him as such guardian according to the order of the court." The special guardian sold the interest of the infant in the lands described in the application and received the proceeds. Upon being required to account an order was made directing him to pay over to the general guardian of the plaintiff the sum remaining in his hands of the proceeds of the sale, which order was modified as to amount by the General Term. Defendant has refused to comply with this order. Defendant claims that as the interest of the infant in the land directed to be sold was contingent and not vested, and not subject to be sold under the order of the court, he is not liable upon the undertaking.

*Thornton A. Niven*, for *applt.*

*Geo. W. Weiant*, for *respt.*

*Held*, That assuming that the infant's interest in the real estate sold was a contingent remainder and not subject to sale under this statute, this action can be maintained. The special guardian had no right to retain or appropriate the money received by him as such. He was the officer of the court, bound to obey its directions in respect to the fund. To whom it may ultimately belong neither he nor his surety have any interest. If the sale was void it may by the consent of the parties be carried out when the infant comes of age. Defendant bound himself by his contract as surety that the special guardian would pay over the fund received by him and obey the orders of the court. Defendant cannot, to escape liability, assail the proceedings under which his principal received the money. The order of the General Term is conclusive as to the liability of the special guardian and measures the liability of his surety. 18 N. Y., 463; 58 id., 315.

The omission of a penalty in such a bond does not affect its validity, but makes the liability commensurate with the condition.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur.

#### TRUSTEES. COMMISSIONS.

##### N. Y. COURT OF APPEALS.

*In re* petition of Allen for leave to resign.

Decided June 17, 1884.

On the acceptance of the resignation of a trustee and his discharge from the trust the court has power to award him an allowance for commissions, and if within the statutory limit its amount is discretionary and not subject to review in this court. See S. C., 16 W. Dig., 282.

The petitioner was one of several trustees appointed to carry out a trust created by the will of W. Upon his petition and for reasons satisfactory to the Supreme Court his resignation was accepted and a successor appointed. The Special Term allowed him one half of one per cent. commission, amounting to \$1,562.15, as for receiving the capital or body of the estate. On appeal the General Term reduced this allowance to \$1,064.97. Both parties conceded that the Supreme Court had jurisdiction to accept the resignation of the petitioner and discharge him from the trust upon such terms as the rights and interests of the persons affected by its execution might require. One party claims that the allowance of commissions is too small and the other that no commissions should have been allowed.

*J. B. Adams*, for applt.

*A. J. Abbott*, for resp't.

*Held*, That it follows, from the concession that the trustee was duly appointed, that he assumed the responsibility and entered upon the discharge of the duties of his office and has in no respect failed in performance. If he was given an allowance for commissions it was as one of the terms or conditions of his discharge. The

court had power to award it, and within the statutory limit by which fees are allowed to executors and trustees its amount is discretionary. If the petitioner accepts the relief asked for he must take it upon such terms and conditions as the court thinks proper to impose, 1 R. S., 730, § 69, and as those in question are not beyond its jurisdiction they are not subject to review.

Appeal dismissed, and order of General Term affirmed.

Opinion by *Danforth, J.* All concur.

## MEDICAL COLLEGES.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Gunn et al., *appls.*

Decided June 17, 1884.

Chap. 319, Laws of 1848, and the acts amendatory thereof, do not authorize the formation of medical colleges.

Chap. 367, Laws of 1882, legalizing certain colleges, has reference only to scientific and literary colleges organized and authorized to be organized under the act of 1848, in whose organization there had been some imperfection, and did not apply to medical colleges.

Since the passage of chap. 184, Laws of 1853, no medical college could be organized except as provided in said act of 1853 or by special charter.

Affirming S. C., 17 W. Dig., 533.

This was an action in the nature of a *quo warranto*, charging defendants with illegally acting as a corporation under the name and style of the "United States Medical College" of the City of New York. They claim to have been legally incorporated under Chap-

ter 319, Laws of 1848, and the acts amending the same and supplementary thereto. That act was entitled: "An act for the incorporation of benevolent, charitable, scientific, and missionary societies." Section 1 as originally enacted provided, that "any five or more persons of full age, citizens of the United States, a majority of whom shall be citizens of this state, who shall desire to associate themselves for benevolent, charitable, scientific or missionary purposes, may make, sign and acknowledge a certificate" and become incorporated. Chapter 51, Laws of 1870, amending said act of 1848, provided, that it should "be deemed to authorize the incorporation of any society for the purpose of establishing and maintaining any educational institution or chapel or place of christian worship, or any parsonage, rectory or official residence of any bishop, pastor or minister of any christian church or association." Section 3 of that act provided, that "any university or college incorporated under the said act, or under this act, may take and hold by gift, grant, devise or bequest, property or endowment, not exceeding in value or amount one million of dollars." Section 1 of the act of 1848 was amended by chapter 649 of the Laws of 1872 so as to read as follows: "Any five or more persons of full age, a majority of whom shall be citizens of and residents within the state, who shall desire to associate themselves together, for benevolent, charitable, literary, scientific, missionary or

mission or other Sunday school purposes, or for the purpose of mutual improvement in religious knowledge, or the furtherance of religious opinion, or for any two or more such objects combined, may make, sign and acknowledge" a certificate and become incorporated.

*F. J. Fithian*, for applts.

*Edward C. Ripley*, for respts.

*Held*, That these acts did not authorize the formation of a medical college. It was not the purpose of the Legislature to authorize any five citizens at any time and place, and without any restrictions, to organize an institution which could in its own way and upon such loose and liberal terms as it chose to prescribe, issue diplomas to its graduates and confer upon them the degree of doctor of medicine.

Before the passage of Chapter 184, Laws of 1853, an act in relation to medical colleges, the only way for the incorporation of a medical college was either by special charter granted by the Legislature or under the General Act of April 5, 1813, and no medical college could thereafter be organized in this state except in the way prescribed in the act of 1853 or by special charter granted by the Legislature.

Defendants claimed that, if their college was originally incorporated illegally, the corporation was legalized by chapter 367 of the Laws of 1882, "An act to restrict the formation of corporations under Chapter 319 of the Laws of 1848, entitled \* \* \* and the acts amen-

datory thereof, and to legalize the incorporation of certain societies organized thereunder and to regulate the same." Section 2 of said act provides that "hereafter no literary or scientific college or university shall be incorporated under the provisions of Chapter 319 of the Laws of 1848 without the approval of the Regents of the university. Section two provides that all scientific and all literary colleges and universities organized under said act which shall have reported to the said regents within two years last past are hereby declared legally incorporated.

*Held*, That this act did not apply to the defendants' institution, but has reference only to scientific and literary colleges, organized and authorized to be organized under the act of 1848, in whose organization there had been some imperfection.

Judgment of General Term, affirming judgment entered upon an order sustaining demurrer to defendants' answer, affirmed.

Opinion by *Earl, J.* All concur.

#### ACCORD. ESTOPPEL.

#### N. Y. COURT OF APPEALS.

The People ex rel. McDonough, *applt.*, v. The Board of Managers of the Buffalo State Asylum for the Insane, *respt.*

Decided June 10, 1884.

Relator was employed by defendant on a monthly salary, which was paid in full until he was discharged. Thereafter he made claim for extra work, &c., which was adjusted, and relator gave a receipt in full

of all demands. In an action to recover damages for his alleged wrongful discharge, *Held*, That if he had intended to claim wages he should have included them in his claim, and is estopped from claiming that they were not covered by his receipt, and that such receipt was an accord and satisfaction.

The relator was employed by the respondent in 1871 as keeper of the asylum grounds. He commenced work without having made any definite agreement as to the terms or duration of his employment. On July 11, 1871, defendant's executive passed a resolution employing plaintiff as keeper at a salary of \$75 per month.

The relator served under this resolution until May 7, 1877, when it was arranged that he should receive \$60 per month thereafter. He worked on these terms until June 9, 1878, when he was discharged, having been paid his salary in full to June 1, 1878. After the relator was dismissed he presented a claim for various items for putting in crops, and defendant appointed H., one of its members, to settle the claim. The claim was adjusted at its amount, \$247, and relator gave a receipt in full of the claim presented by him, and endorsed upon it, "I hereby acknowledge this to be a receipt in full of all demands of every name and nature which I have against the asylum," which he signed. The relator now claims that he was employed by the year, and seeks to recover damages by reason of his discharge, which he claims was wrongful. The testimony showed that the allowance made to

relator included all claims against the asylum, and that relator's damages for being thrown out of employment were also considered, although nothing was said about wages in the bill.

*David F. Day*, for applt.

*Delevan F. Clark*, for respt.

*Held*, That the settlement and instrument executed by the relator included all damages sustained by the relator by reason of his discharge; that if he had intended to claim wages he should have included them in his claim, and is estopped by his silence from insisting that such claim was not covered by the instrument executed by him. The receipt executed by the relator was an accord and satisfaction. 1 Denio, 257.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Miller, J.* All concur.

## FIREMEN.

### N. Y. COURT OF APPEALS.

The People ex rel. Masterson, *respt.*, v. The Board of Commissioners of Fire Dept. of N. Y., *applt.*

Decided June 17, 1884.

Relator fell from the tender, hurt his leg and went home. He failed to report, although directed by the medical officer to do so, but finally did so pursuant to written order, but refused to explain his default and remained silent. He was removed for being absent without leave, disobedience of orders and neglect of duty. *Held*, No error; that it was his duty to be at his post ready to obey proper orders even though excused for a



time from services at fires; that if his injury was a sufficient excuse he should not have remained silent when given an opportunity to explain.

The relator was dismissed from the position of fireman in the New York City Fire Department under charges for being absent without leave, disobedience of orders and neglect of duty, of which charges he had notice and a hearing thereon. The evidence showed that on the night of April 17, 1879, the relator fell from the tender and hurt his left leg and immediately went home. It did not appear that he had permission from any one to do so. It was his duty to report to the medical officer at headquarters, if able. The medical officer called upon him in the evening and examined his injury. He testified that it was slight and consisted merely of an abrasion of the external skin, though he thought possibly there might be some stiffness of the knee joint. He directed the relator to report at headquarters at 8 o'clock the next morning. He failed to do so, but sent his wife to say he was unable to come. There was no proof of such inability. At the close of the day, upon a written order from his commanding officer, he reported for duty. When called upon to explain or make any statement on his own behalf he refused and remained silent. It appeared that at the time the accident occurred to the relator he had been excused from duty at fires, but not from the performance of light duty.

*D. J. Dean*, for applt.

*Ambrose H. Purdy*, for resp't.

*Held*, That the relator was properly dismissed, as the evidence was sufficient to establish the charges made, 82 N. Y., 358; that it was his duty to be at his post ready to obey proper orders even though he had for a time been excused from services at fires. If his injury was a sufficient excuse and the contrary judgment was a mistake the relator should have been willing to verify the fact and not remain silent when furnished an opportunity to speak.

Order of General Term, reversing order of Special Term confirming report of commissioners, reversed, and order of Special Term affirmed.

*Per curiam* opinion. All concur.

### VERDICT. AMENDMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*John H. Jencks, resp't., v. Cornelius Van Brunt, appl't.*

Decided May 9, 1884.

Under § 1207 of the Code of Civ. Pro. the trial judge has the power, if his attention is called to the fact that a verdict rendered exceeds the amount demanded in the complaint, to order an amendment of the complaint so that such verdict will not exceed the demand, but it is doubtful whether the General Term possesses the power to make such an amendment upon an appeal.

Where the attention of the trial judge is not called to a slight excess in the verdict over the amount demanded in the complaint, and no suggestion is made of that fact until the argument of an appeal, the General Term will exercise its discretion as favorably to the plaintiff as possible, and will not reverse the judgment and order a new trial unless the excess should be deducted with-

out costs of the appeal to either party, but will reduce the judgment by deducting the excess as of the date of the verdict, and, as so reduced, will affirm the same, with costs.

Appeal from judgment entered upon verdict, and from order denying motion for a new trial on the minutes of the judge, and on the ground that the verdict was against the weight of evidence.

*A. S. Cushing*, for applt.  
*J. B. Leavitt*, for resp.

*Held*, That the question whether the verdict was against the weight of evidence depended upon whether the testimony on the part of defendants was or was not entitled to credit in preference to that on the part of plaintiff; and since the learned judge before whom the case was tried, having full opportunity to see and hear the witnesses and to determine their relative credibility, had refused to interfere with the verdict, the order should be affirmed; and, as the same questions were involved in the appeal from the judgment, the same result would follow.

The verdict was for \$39.34 more than the demand contained in the complaint with interest. The attention of the court below was not called to this discrepancy nor was any suggestion made upon the subject either at the trial or upon the motion for a new trial.

*Held*, That if the attention of the judge had been called to the fact he would undoubtedly have directed a deduction, or have ordered an amendment of the complaint so that the verdict would not exceed the amount demanded,

with interest, as he has power to do under §1207 of the Code of Civ. Pro.; but that it was doubtful whether the General Term, on an appeal, possessed the power to make such an amendment.

That if attention had been called to the discrepancy there would appear to be such an error as to require the judgment to be reversed and a new trial ordered unless the excess should be deducted without costs of the appeal to either party; but, since no suggestion was made until the argument of the appeal, the General Term should exercise its discretion as favorably to plaintiff as might be done under established rules; and the judgment, therefore, should be reduced by deducting the excess as of the date of the verdict, and, as so reduced, affirmed, with costs.

Ordered accordingly.

Opinion by *Davis, P. J.*; *Daniels* and *Haight, JJ.*, concur.

#### DEEDS. COVENANT. RATIFICATION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Edward Kelly et al., appls., v. Frances C. Geer, resp.*

Decided May, 1884.

▲ grantee in a deed who has never accepted it or exercised any acts of ownership over the property conveyed is not bound by a covenant therein to pay a mortgage on such property.

▲ husband purchased property which he caused to be conveyed to his wife and son subject to a mortgage, the deed containing a covenant to assume and pay said mortgage. The wife knew nothing of the deed,

had no possession or control of the premises, and received none of the rent. She subsequently joined with her son in a quit-claim deed. *Held*, That she did not thereby ratify the prior transactions and was not liable on the covenant.

Appeal from a judgment entered upon a decision at the circuit, on a trial by the court without a jury, dismissing the complaint.

On the 1st of March, 1869, the plaintiffs executed a conveyance to the defendant and her son, Harvey M. Geer, of certain real estate. The premises were conveyed as follows: "Unto the said Frances A. Geer, for and during the minority of her son, Harvey M. Geer, and until the said Harvey M. Geer shall arrive at the age of twenty-one years, and unto the said Harvey M. Geer and his heirs, to his and their own use in case he shall arrive at the full age of twenty-one; but in case the said Harvey M. Geer shall decease before he arrives at the age of twenty-one, then unto the said Frances A. Geer and her heirs and assigns, to their own use forever. The premises were conveyed subject to the payment of a mortgage for \$3,500, which the party of the second part assumed and agreed to pay as a part of the consideration money.

The wife knew nothing about the purchase or the terms of it; never saw the deed or knew that she was named in it; never paid anything on the purchase, nor did she ever have possession of the premises, or any control over them, or receive any portion of the rents and profits therefrom. On the 7th of March,

1872, the defendant joined her son, Harvey M., in a conveyance of the premises to Michael Murphy, who assumed the payment of the mortgage above mentioned. Harvey M. Geer, at the time of the last mentioned conveyance, was of age and alone warranted the title. A deficiency of \$1,193.77 on the mortgage having arisen on foreclosure, this action was brought to recover the same of the defendant.

*Charles E. Patterson*, for applts.

*Henry A. Merritt*, for resp't.

*Held*, That she was not bound by the covenant to pay the prior mortgage.

A grantee in a deed, who has never accepted the same, nor exercised any acts of ownership over the property conveyed, is not bound by a covenant therein to pay a mortgage upon such property.

*Held also*, That the fact that the wife afterwards joined with her son in a conveyance of the premises by quit-claim deed did not make her liable on the covenant in the original deed, or operate as a ratification of the prior transactions, it not appearing that she then had any knowledge of them or derived any benefit from the subsequent conveyance.

To render a ratification effectual it is necessary that it should be made with knowledge of all the material facts.

Judgment affirmed, with costs.

Opinion by *Bockes, J.*; *Learned, P. J.*, concurs; *Boardman, J.*, not acting.

# PECULATION. CRIMINAL LAW.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Bork, *applt.*

Decided June 3, 1884.

Under Chap. 19, Laws of 1875, the value of the property converted is not an element of the crime, and a special finding by the jury of the amount of the loss is not essential to the power of the court to sentence under that act.

After the passage of Chap. 380, Laws of 1882, a Court of Oyer and Terminer constituted under the former law was unauthorized even for the purpose of pronouncing sentence on affirmance of a conviction had prior to the passage of the law of 1882, and a sentence passed by a court so constituted is invalid.

The provisions of § 962, Code Crim. Pro. do not refer to the organization of criminal courts, but to the procedure therein.

Defendant was convicted June 13, 1881, at a Court of Oyer and Terminer in Erie County composed of a Justice of the Supreme Court and two Justices of Sessions, under Chap. 19 of the Laws of 1875, of the crime of peculation and embezzlement. The jury rendered a general verdict of guilty as charged in the indictment, but made no finding in respect to any loss resulting from the crime. Before sentence defendant sued out a writ of certiorari to review the conviction, which was affirmed by the Supreme Court and by this court. 91 N. Y., 5. On May 3, 1883, at a Court of Oyer and Terminer held by the same officials who constituted the court at the time of the trial, defendant was sentenced to the State Prison for five years.

Vol. 19—No. 12b.

*Morris Morey*, for *applt.*

*Tracy C. Becker*, for *respts.*

*Held*, That under the Act of 1875 the value of the property converted is not an element of the crime, nor are there any degrees of crime under this statute. The crime is complete whatever may be value of the property converted, but the fine may be graduated by the resulting loss. The amount of the loss is an extrinsic fact which does not enter into the definition of the offence. A special finding by the jury of the amount of loss is not an essential condition to the exercise by the court of the power to sentence a defendant in accordance with the Act of 1875. § 1.

In the absence of evidence as to the amount of loss, or of any request to the court to direct a special finding, a general verdict of guilty is lawful.

The direction in § 962 of the Code of Criminal Procedure, that criminal actions and proceedings commenced before the passage of said Code "must be conducted in the same manner as if this Code had not been passed," has no reference to the organization of criminal courts, but to the procedure in such courts. 29 Hun, 513.

The organization of courts of Oyer and Terminer, with the exception that a Justice of the Supreme Court must preside, is within the control of the Legislature. 47 N. Y., 363. A change in the persons who compose the court, or in the number of judges, does not change its essential character. After the passage of the

Act of 1882, Chap. 360, a Court of Oyer and Terminer constituted under the law of 1847 was unauthorized, and the judgment in this case was void because rendered by a court not legally constituted. It must be presumed that the two Justices of the Sessions took part in the proceedings, and that three persons sat as judges, all of whom participated in the proceedings, when by law but one of the persons constituting the court was qualified to sit or act in rendering judgment. 3 N. Y., 547; 18 id., 128; 63 id., 36.

*Also held*, That the conviction having been lawful, the defendant cannot again be put on trial, 25 N. Y., 405; 29 id., 124; but the judgment should be reversed and the record remitted to the Oyer and Terminer of Erie County with directions to proceed and sentence the defendant under the Act of 1875.

Judgment of General Term, affirming judgment of conviction reversed, and record remitted to Erie County Oyer and Terminer with directions to proceed and sentence defendant under the Act of 1875.

Opinion by *Andrews, J.* All concur.

#### COMMISSIONERS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*In re* petition of Edward B. Underhill.

Decided May, 1884.

The power to remove a commissioner appointed by a county judge under Chap.

888, Laws of 1869, as amended by Chap. 303, Laws of 1871, for good cause shown is incident to the power of appointment.

The County Judge of Westchester County appointed three commissioners under Chap. 888, Laws of 1869, as amended by Chap. 303, Laws of 1871. These statutes refer to the drainage of swamps. Application was made to the county court to remove one of the commissioners because he had made up his mind, and publicly expressed it, in favor of draining the swamps in question before his appointment. The county court declined to act because it had no power, after the appointment of a commissioner, to remove him.

*S. C. H. Bailey*, for applt.

*Travis & Smith*, for resp't.

*Held*, Error; that such a power should be incident to the power of appointment in a court of law. The commissioners are to fix, by a majority vote, whether ditches shall be opened through the lands of others than the petitioner, and whether the drainage is necessary for the public health. They have power to assess the cost of the work upon the land benefited. It is evident that the land owners through whose lands the ditch is to go, if it is opened, should have a fair tribunal, as well as those who have to pay for the work. The Legislature have not left the question in doubt. By § 14 of the Act of 1869 it is provided that "the county court may at any time correct any manifest error in any of the proceedings under this act, when such correction shall be in furtherance of justice, and the

said court may allow such amendments, *and make such orders*, and impose such terms as shall promote the objects of this act and be equitable to all parties."

Full power is given to reach an equitable result. Appeals from the orders of the county court are given to this court. § 12 of the Act of 1869.

Order reversed, and record remitted to the county court to pass upon the merits of the motion to remove the commissioner.

Opinion by *Barnard, P. J.*; *Pratt and Dykman, JJ.*, concur.

#### RIPARIAN OWNERS. PRE-EMPTION.

##### N. Y. COURT OF APPEALS.

The Mayor, &c., of N. Y., *applt.*,  
v. Hart et al., *respts.*

Decided April 15, 1884.

Under the Harlem patent of 1666 the river line was at high water mark and the grant did not include the tideway or land between high and low water mark, of which the city, under the Dongan charter, became the absolute owner on the whole circuit of Manhattan island.

The act to designate the persons entitled to purchase lands under water by its literal terms gave a pre-emptive right only to those owners of the upland who had previously acquired by grant from the city the tideway in their front, save in the case of an upland owner in whose front there was no tideway.

The owner of the upland, though he have no statutory right of pre-emption in the tideway in front, has such an equity or first preference in it, recognized by the city in the sinking fund ordinance, that the city having given him a deed of such tideway, cannot then say he was not within the terms of § 11 of the ordinance.

This was an action of ejectment. Plaintiff sought to recover possession of certain land in the city of New York, lying between the original high-water mark of the Harlem river and the bulkhead line therein. Defendants claimed that a grant, made by Governor Nicolls to the freeholders and inhabitants of Harlem, of a tract extending "eastward to the end of the Ryver, or any parte of the said Ryver on which this island doth abutt," ran to low-water mark, and that the tideway belonged to the freeholders of Harlem and never became the property of the city of New York.

*D. J. Dean*, for applt.

*John E. Parson*, for respts.

*Held*, That the grant from Governor Nicolls only conveyed to high-water mark; that the city acquired by the Dongan charter of 1686 title to the land between high and low-water mark in front of said tract; that this title was in its origin absolute and not burdened with any pre-emptive privilege amounting to a legal right in any one. 6 Seld., 567; 70 N. Y., 303; 93 id., 134; 6 Cow., 528; 19 N. Y., 523; 93 id., 144; 3 Kent's Com., 432; 9 Conn., 40; 3 Zab., 689.

Chapter 285 of the Laws of 1852 provides that "the proprietors of all grants of land under water, or owner or owners of all lands adjacent to those hereby granted, shall have a pre-emptive right in all grants which may be made by the said mayor, etc., if any, of the lands in front of the said lands

under water heretofore granted by the said mayor, &c."

*Held*, That the pre-emptive right given by said act was only given to the city's grantees of the tideway, save, at least, in the case of an upland owner in front of whose land there was no tideway. Said upland owners had, however, an equitable claim to priority of purchase, which was recognized and protected by the city, and upon acceptance of the terms and conditions proposed by the city would be legally entitled to a deed under § 11, title 4 of the sinking fund ordinance passed in 1844, and recognized and adopted by the State in 1845 (Ch. 225, § 5), which authorized the comptroller "in all cases of grants of land under water" to issue the grant "to the party legally entitled thereto" on his paying or securing the price specified therein.

Said ordinance (§ 17) required, that in case of a sale of real estate belonging to the city, in which no one had a pre-emptive right or equitable claim to a preference, that it must be at public auction, after notice of twenty days. A deed was given, of part of said tideway and adjoining land under water, by the comptroller to the owner of the adjacent upland, upon payment of the price fixed by the comptroller.

*Held*, That the deed was valid.

Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by *Finch, J.* All concur, except *Ruger, Ch. J.*, and *Earl, J.*, dissenting, and *Miller, J.*, not voting.

## SUPERVISORS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People ex rel. Burch v. Isaac N. Mills, County Judge.

Decided May, 1884.

Boards of Supervisors may make rules for the conduct of their proceedings, and such rules are a law to the Supervisors and all persons dealing with them.

It was a rule of the Board duly adopted that a motion for reconsideration may be made by any member, but that no such motion should be in order unless made on the same day or on the next day following the decision proposed to be reconsidered, unless by unanimous consent.

On the second day of January, 1884, a resolution was offered appointing one Kinch as librarian for the year commencing the 1st of January, 1884. An amendment was proposed that the relator be appointed instead of Kinch. The amendment was carried. On the next day a reconsideration was moved and carried. On the 7th day of January, 1884, Kinch was appointed.

*Held*, That the procedure was in entire accordance with the rules and any appointment would be subject to them. They are a law to the Supervisors and to all persons dealing with them. All contracts implied from a resolution are subject to the right to change it by another resolution passed in accordance with the rules of the Board, otherwise a minority might bind immutably a majority tem-

porarily absent by a resolution or other enactment.

Order affirmed.

Opinion by *Barnard, P. J.*; *Pratt, J.*, concurs.

### LIFE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Harriet C. Knapp, respt.*, v. The Northwestern Mut. Life Ins. Co., *applt.*

Decided April, 1884.

Testimony considered and verdict of accidental self-killing set aside as against the weight of evidence.

Appeal from Special Term order denying defendant's motion for new trial.

Action on insurance policy issued by defendant on the life of plaintiff's husband. The assured died April 16, 1877. He was in some business trouble, and had not been to his store for four or five days, but had been ill at home, and had complained of severe pain in his head. Early in the morning of the day of his death he had gone to his store, had returned home, spent some time reading in his wife's room, and then about ten o'clock in the forenoon he went from the house to a privy on his premises, and a few minutes later was found there dead. On the right side of his head, a little above and in front of the ear, was a pistol shot wound, the ball having passed horizontally into his brain. He was found lying partly on his back and partly on his left

side, his right hand bent up, resting on his body, and a pistol was lying on the floor, to the left of him. He lay diagonally across the floor of the closet, his feet against the door, and his head farthest from it. There is no evidence that he had seated himself or that he had removed or unfastened any of his clothing. No other person was at or near the privy. The jury found, impliedly, that the pistol was discharged accidentally, and the only question is whether that finding is against the weight of evidence.

*W. N. Cogswell*, for *applt.*

*C. T. Bartlett*, for *respt.*

*Held*, The following rules apply: (1.) The burden of proof is on defendant. (2.) Defendant is not required, however, to establish the fact of suicide beyond a reasonable doubt. 90 N.Y., 640. (3.) No theory is to be accepted that is not consistent with all the facts.

The finding is against the weight of evidence. The fact of suicidal intent is established circumstantially by at least a fair preponderance of evidence.

Order reversed and new trial ordered, costs to abide event.

Opinion by *Smith, P. J.*; *Har- din* and *Barker, JJ.*, concur.

### TENANTS IN COMMON. CON- VERSION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Annie I. Thomas v. Rosina Williams.*

Decided April, 1884.



One owner in common of a crop of grain kept it in a barn to which his co-owner had access, and the latter demanded that the former clean and divide the grain, which was refused. *Held*, No conversion, even though the duty rested upon the co-tenant to do as requested.

Motion by defendant for new trial on exceptions taken at circuit and ordered heard at General Term in first instance.

Replevin for a quantity of grain raised by defendant on plaintiff's farm on shares.

Plaintiff leased her farm to defendant for a term of years, to be worked on shares. At the time of the lease there was a crop of wheat growing on the farm which the lease provided was to be harvested by defendant and "the same equally divided." The lease also provided that "all crops and all other products of said farm during said term shall be equally divided on the farm." Defendant and her husband lived on the farm and plaintiff occupied part of the house, which she reserved in the lease. The first season defendant raised barley and oats, and those crops with the wheat were harvested, put into the barn on the premises, and threshed. Defendant had the control and management of the farm, and was in possession of the grain after it was threshed. Plaintiff had daily access to the barn. Shortly after the grain was threshed plaintiff asked defendant to have it cleaned and one-half given to her, and defendant refused. The grain lay in the barn until it was replevied in this suit. The sheriff who served the replevin papers testified that at

plaintiff's request he asked defendant to divide the grain, and she said she wanted to see her husband first. The husband came in and witness asked him to have the grain divided without any trouble; they refused. On cross-examination witness testified that Williams said he would not do it until they came to Canandagua, and he spoke about an injunction that had been served on them.

One M. testified that at plaintiff's request he called on defendant and asked them to divide the grain, and Williams said it could not be divided "until this matter was settled." The injunction referred to had been obtained by the plaintiff in a prior action, and restrained defendant and her husband from selling or interfering with said crops. The court charged that if defendant was asked to divide and deliver half the grain and refused, that was a conversion. To which defendant excepted.

*E. W. Gardner*, for deft.

*H. M. Field*, for plff.

*Held*, Error. There was no conversion. Defendant was under no obligation to perform the labor of cleaning and dividing the grain. Either party had the right to separate his share from the bulk and take it away at any time, and there is no evidence that plaintiff could not have done so had she so chosen. Even had it been defendant's duty under the lease to clean and divide the grain, her failure to do so would not have amounted to a conversion, but would have been only a breach of contract, subject-

ing her to payment of damages. The injunction created no excuse for refusing to perform plaintiff's request.

*Lobdell v. Stowell*, 37 How. Pr., 88; 51 N. Y., 70. 75; *Stall v. Wilbur*, 77 id., 158; *Osborn v. Schenck*, 83 id., 201; *Van Doren v. Balty*, 11 Hun, 239, distinguished.

Motion granted, with costs to abide event.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## HUSBAND AND WIFE ABSENTEES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Gazena C. Jones, applt., v. Orvis H. Zoller et al., respts.*

Decided April, 1884.

The words "absented himself," as used in 2 R. S., 139, § 6, mean a withdrawal of the husband's whereabouts from his wife, his relations, and the ordinary and usual opportunities of identification—such a withdrawal from his wife and family as would, after the lapse of five successive years, lead naturally to the inference that death had ensued.

Appeal from judgment on verdict at circuit, and from order denying motion for new trial on the minutes.

Action to recover dower in real estate belonging to James Jones, deceased, with whom plaintiff intermarried in 1875. The defence is that plaintiff had a former husband, Firth, who was living when she married Jones. At the trial plaintiff tried to bring her case within 2 R. S., 139, § 6. The trial

judge submitted two questions to the jury: "First—Did John Firth, the first husband of the plaintiff, absent himself for the space of five successive years prior to her marriage to James Jones, within the meaning of the statute on the subject? Second—Was said John Firth known to the plaintiff to be living during the period of five years immediately preceding her marriage to James Jones?" The jury answered each question in the negative. Plaintiff and Firth were married in 1835, at Deer River. Plaintiff testified that they lived at Troy three or four years, and then Firth went to New York, and his wife to her relatives at Pamelia, with whom she lived five or six months. Next they lived together and kept house in Syracuse some four months, at the end of which time Firth failed to provide for his wife. They were set out of doors by their landlord for non-payment of rent, and she left him on account of his dissipated habits and went to a boarding-house, her husband not paying her board. Firth remained about the city until Dec. 1861, when he enlisted in the army, where he remained about 18 months. Shortly before he enlisted his wife went to her relatives and lived with them at Pamelia, Deer Creek and Gouverneur, about a year and a half. At the latter place she engaged in the millinery business. She had with her the two children of her marriage with Firth, whom she supported. While she was at Gouverneur Firth sent her once \$100. He visited her

there once for four weeks when he was on a furlough. They corresponded together frequently while she was there and he in the army, and in 1863 or 1864, after he left the army, he visited her there for two weeks and asked her to go and live with him. And about that time she was in Syracuse on business, and Firth let her have \$50 to aid her in her business at Gouverneur. She did not see him again until after her marriage with Jones. Firth testified that he and his wife moved from Troy to Syracuse in 1858; that he had resided in Syracuse and vicinity ever since; that in 1863 or 1864, after he let her have \$50 to aid her in her business, she wrote him that she had made up her mind to come and live with him; that he then spoke for a house to rent, and soon after received another letter from her saying she declined to come through the advice of friends; that he then went to the oil regions; was there eighteen months, returned to Syracuse; worked there part of the summer, and in 1865 went to Cardiff, a small place 12 miles from Syracuse, where he lived till after plaintiff married Jones; that for the first two or three years of his stay there he lived in the families of different persons for whom he worked, and that in 1868 a Mrs. S. became his housekeeper, and they lived together six or seven years till she died. It may be assumed that he married her, as plaintiff offered to prove that fact, and it was excluded on defendant's objection

that it was immaterial and incompetent.

*Elon R. Brown*, for applt.

*O'Brien & Emerson*, for Zollers, respts.

*Porter & Watts*, for other respts.

*Held*, Upon a former appeal, 17 W. Dig., 227, Mr. Justice Hardin, who declared the opinion of the Court, interpreted the words "absenting himself," as stated in the syllabus, and that is the rule to be applied here.

Whether plaintiff violated her conjugal duty in refusing to return to Syracuse and live with her husband is not in question here.

The verdict that Firth did not absent himself is against the clear weight of evidence, and this has led to inconsistent findings.

The evidence of Firth's second marriage should have been received as bearing directly upon the question whether his change of residence was with the intention of absenting himself from his family.

Judgment and order reversed, and new trial ordered, costs to abide event.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## MUNICIPAL CORPORATIONS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

John N. Dressel, *respt.*, v. The  
City of Kingston, *applt.*

Decided May, 1884.

A city is liable for the negligence of a contractor employed by it irrespective of the

fact whether or not by the contract such contractor has stipulated to conduct the work with all needful care and to save the city harmless from all claims for injuries caused thereby.

Appeal from a judgment entered upon a verdict in favor of the plaintiff. The action was brought to recover damages for personal injuries sustained by the plaintiff, by reason of the neglect of the city to keep its side-walks in a safe condition for travel. The plaintiff recovered a verdict for \$300.

The city contracted with L. for the grading of a part of P. street and other streets in the city. The work was to be done under the direction and to the satisfaction of certain city officers named; and it was stipulated that L. should adopt and take all necessary precautions for the prevention of accidents. This last requirement he omitted to observe. Having, by his servants, blasted a hole in the side-walk near the foot-path, for the purpose of setting the curb-stone, he left it uncovered and wholly unguarded by light or otherwise. Plaintiff, in passing along the walk, fell into the excavation, and was injured.

*John J. Linson*, for applt.

*E. S. Wood*, for respt.

*Held*, That the city was liable to the plaintiff for the damages sustained.

That the question of contributory negligence on the part of the plaintiff was one for the jury, on all the circumstances of the case as disclosed by the proof.

That in respect to the liability of the city for the negligence of L.,

Vol. 19.—No. 13

the contractor, the case fell directly within the decision in *Storrs v. City of Utica*, 17 N. Y., 104, where the defendant's liability was declared upon similar facts.

*Held also*, That the liability of a city for the negligence of a contractor employed by it is put beyond cavil by the recent decisions; and this too, irrespective of the fact whether or not the contractor, in and by his contract, stipulated to conduct the work with all needful care and prudence, and further, to save the city harmless from all claims for injuries which should be caused thereby.

Judgment affirmed, with costs.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

## NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Alice Lake, respt.*, v. *The N. Y. C. & H. R. RR. Co.*, *applt.*

Decided April, 1884.

The testimony showed that plaintiff's view of the railway track was obstructed by an embankment and also by a freight train moving on another track; that plaintiff looked and listened before trying to cross the track; and that the train by which she was hurt was close upon her when she first saw it. *Held*, That the question whether the bell was rung was fully raised, and that plaintiff's negligence in not sooner seeing the train was not made out.

Where the driver of a horse and wagon, in trying to avoid an approaching train, strikes the horse so that it starts and throws out an occupant of the wagon, who is thus injured, it cannot be said that the train is not the proximate cause of the accident.

Appeal from judgment on verdict at circuit and from order denying motion for new trial on a case.

Action for damages for personal injuries alleged to have been sustained by plaintiff through neglect of defendant's employees to give the statutory signals upon the approach to a highway of the train which caused the accident. Plaintiff and her sister-in-law were riding in a wagon with three children, one of whom, a boy twelve years old, was driving. The highway ran north and south, crossing the railroad tracks, three in number, nearly at right angles, and plaintiff's party were driving south. The driver and his two sisters sat on the front seat, and the others sat behind. As they neared the tracks they saw a freight train coming from the east on the north track, and they stopped while it passed. They then started to cross, and when on or near the middle track they discovered the headlight of a train on that track coming from the west, and apparently very near them. The driver being frightened struck the horse so that it started and dragged the wheel against the rails, or some other obstacle in the highway, with such force as to throw plaintiff to the ground, causing the injuries complained of. The railroad west of the crossing runs through a cut and for forty rods is hidden from the view of one approaching on the highway from the north until the observer gets within sixteen feet of the north track. The time of the accident was evening, when

it was growing dark. The testimony of plaintiff and the driver was to the effect that they stopped and listened and looked before going upon the track, and that when the train was first discovered it was close upon them, and the driver testified that the passing train hid the headlight of the approaching engine.

*James F. Gluck*, for applt.

*William C. Watson*, for respt.

*Held*, That the testimony fully raised the question whether the bell was rung continuously within eighty rods of the crossing, and the jury were warranted in finding that it was not rung.

Plaintiff's negligence in not sooner seeing the approaching headlight is not made out.

Appellant's contention that the striking of the horse by the driver, and not defendant's negligence, was the proximate cause of the injury, is untenable. 75 N. Y., 320.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Har- din, J.*, concurs; *Barker, J.*, not sitting.

#### JUSTICES OF THE PEACE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People ex rel. Lawrence, *respt.*, v. Elias Mann et al., *appls.*

Decided May, 1884.

Justices of the Peace fall within the provisions of Sec. 18 of Article 6 of the Constitution of New York prohibiting the holding "of office of Justice or Judge of any court longer than until and including the last day

of December next after he shall be seventy years of age."

Affirming S. C., 18 W. Dig., 298.

The only question presented is whether the provisions of § 13 of Art. 6 of the constitution of New York include Justices of the Peace of the state.

*W. H. H. Ely*, for respt.

*J. L. Millard*, for applts.

*Held*, There is no real authority upon the question. The article of the constitution in question seems to refer only to Judges of the Court of Appeals and to Justices of the Supreme Court, at least those judges only are named in it. It has been decided, however, that the prohibition as to age did apply to county judges although not named in the article, 78 N. Y., 403, and that it did not apply to county judges who were in office at the adoption of the constitution. 45 N. Y., 812; 59 Barb., 198. It was held in *Dohring v. The People* that Justices of the Peace were not within the proviso of the constitution limiting the tenure of the judicial office to seventy years of age. 2 T. & C., 458. This case was affirmed in the Court of Appeals, but without touching the point under consideration. 59 N. Y., 374. In this case a Justice of the Peace sat upon a criminal trial, but being a de facto officer the judgment was upheld on that ground. 23 N. Y., 296. The words of the constitution are broad enough to cover Justices of the Peace, but neither the constitution nor the law under it has called for a certificate of age from these officers, while it does

so from judges of courts of record. The prohibition is not weakened by this omission if a Justice of the Peace was designed to be included in the article. The limitation would reach the term and end it by its own force. The words are sufficiently comprehensive to cover Justices of the Peace. The reason of the prohibition applies to all judicial officers and the terms used have been passed upon by the courts before the constitution was adopted and were held to cover Justices of the Peace. By 2 R. S., 274, §2, it was provided that "no judge of any court can sit as such in any cause in which he is a party or in which he is interested or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." This section was held to cover Justices of the Peace. 21 Wend., 63; 1 Hill, 654; 28 Barb., 503. The rule at common law is otherwise. 13 Johns., 191; 17 id., 133.

Order affirmed.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs; *Pratt, J.*, dissents.

#### DECEIT. VARIANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*John B. Gossler et al., applts., v. Lazarus Lissburger, respt.*

Decided March 28, 1884.

In an action to recover damages for fraudulent misrepresentations, where the complaint charged that defendant misrepresented that his father and principal, in whose

name the goods were purchased, was perfectly solvent and would pay all his indebtedness in full, but that most of his money was tied up for the moment in margins advanced to bankers for carrying stock, and the proof at the trial was that defendant represented that the house for which he acted was all right and would take care of its contracts, and it was only on account of the rush for margins made on the part of the bankers that the purchaser was prevented from paying at once. *Held*, That the variance between the misrepresentation charged in the complaint and that shown by the evidence was not fatal, and as the variance was not shown to have misled defendant it should be disregarded under § 539 of the Code.

To sustain an action for damage for fraudulent misrepresentations by which plaintiff was induced to sell goods on credit, it must appear as an element that defendant knew or had reason to believe that his statements were false, or defendant must have falsely conveyed the impression that he had actual knowledge.

Appeal from order setting aside verdict and directing new trial.

Action to recover damages for fraudulent misrepresentations charged to have been made by defendant by which plaintiff was induced to sell one H. L. iron rails. The complaint charged that defendant misrepresented that his principal, for whom the purchase was made, was perfectly solvent and would pay all his indebtedness in full, but that most of his money was tied up for the moment in margins advanced to bankers for carrying stock, and the proof at the trial was that defendant represented that the house for which he acted was all right and would take care of its contracts, and it was only on account of the rush for margins made on the part of the bankers that the said H. L.

was prevented from paying at once.

*A. G. Fox*, for applts.

*F. R. Minrath*, for resp't.

*Held*, That the variance was not shown to have prejudiced defendant and should be disregarded under § 539 of the Code.

In submitting the case to the jury the judge charged: "If you find the fact that the representation was made and also that it was untrue, then the next question for you to determine will be whether they, plaintiffs, parted with the goods upon the representation made, not solely upon that, but whether it entered into the inducement with plaintiffs in parting with them."

*Held*, Error; for by the direction, which was repeated in several ways, the jury were left at liberty to find a verdict against defendant even though he did not know or have reason to believe the representation was false, or did not make it to deceive or defraud plaintiff's agent. 40 N. Y., 562.

The order was therefore properly granted, and the same is affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### SHERIFFS. EVIDENCE. RECEIVERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John W. Salter, recr., *resp't.*, v. Peter Bowe, sheriff, *applt.*

Decided March 28, 1884.

The admissions of a Deputy Sheriff having charge of the sale of certain property upon

executions issued to the sheriff, as to the amount realized upon the sale, is an admission by an agent as to the business of the agency and is competent as evidence against the sheriff.

A judgment creditor procured himself after the return of his execution unsatisfied to be appointed receiver in supplementary proceedings of his judgment debtor's property, and as receiver sued the sheriff for a surplus remaining in his hands after satisfying certain executions by a sale of the judgment debtor's property. *Held*, That it was no obstacle to the plaintiff's recovery that the sheriff had returned unsatisfied executions prior to plaintiff's and subsequent to those satisfied larger in amount than plaintiff's judgment; that the fact that there had been a previous sale to the one upon which the surplus had been realized, which was set aside as irregular, and that afterwards and subsequent to the second sale such order setting aside the first sale has been reversed on appeal, the purchaser on both sales being the same person, was no defence to the sheriff; the purchaser in the first sale assented to the second sale and does not complain; that the fact of the existence of a general assignment by the judgment debtor prior to the time when the surplus arose, and which since the commencement of this action had been declared void by judgment, was no defence to the defendant, and that the plaintiff can recover the whole surplus, though in excess of the amount of his judgment.

Appeal from judgment recovered on trial before the court.

Action by plaintiff, who is a receiver appointed in supplementary proceedings on his own judgment, to recover as receiver a surplus in the sheriff's hands arising upon a sale of the judgment debtor's property. A surplus was shown to have arisen, by the admissions of the deputy sheriff who had charge of the sale and by other proof, of upwards of \$1,800, and judgment for the whole surplus, though in excess of plaintiff's

judgment, was awarded plaintiff. The court below, against objection, admitted evidence of the admissions of defendant's deputy against him as to the amount realized at the sale, and held that the fact that, as appeared by the evidence, the Sheriff had returned *nulla bona* executions subsequent to those satisfied and previous to plaintiff's, greater in amount than the surplus, constituted no defence, and the fact that there had been a previous sale to that upon which the surplus arose, which was set aside after the second sale, the same person purchasing under both sales, made no difference, and further that the existence of a general assignment by the judgment debtor before the surplus arose, which had been declared void since the action was commenced, was no defence to the sheriff.

*Chas. F. McLean*, for applt.

*John H. Hull*, for resp't.

*Held*, No error. 63 How., 191; 2 Duer, 362; 40 N. Y., 383.

Judgment affirmed, with costs.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

## WILL. UNDUE INFLUENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*In re* probate will of Elihu R. Phelps, deceased.

Decided May, 1884.

To invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such influence is to be inferred. Proof that the party to be



benefited had the motive and opportunity to exert such influence is not sufficient.

A mere change of purpose in making a testamentary disposition of property will not invalidate a will, without proof of other pertinent and forcible facts showing undue influence.

Appeal from a decree of the Surrogate of Washington county, admitting the will of Elihu R. Phelps to probate as a will of real and personal property.

The testator left no widow, child or descendant him surviving; his nearest relations being a brother and two half sisters—the contestants. By his will he gave to his brother and half-sisters each \$300, and the remainder of his property to the relatives of his deceased wife with whom he had for many years held intimate and friendly intercourse.

*Henry A. King* and *J. F. Getty*, for applts. and contestants.

*Lowrie & Gibson*, for respts.

*Held*, That to invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such influence is to be inferred.

It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence. There must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud, or other improper means; that the instrument is not really the will of the testator.

The fact that a testator has, instead of giving his property to his blood relations, bequeathed it to relatives of his wife, under the be-

lief that the former were negligent of him, and careless of his comfort, will not of itself, unaccompanied by fraud, coercion or undue influence, be sufficient to invalidate his will deliberately made when in full possession of all his faculties.

The fact that a will is not in accordance with the testator's previously expressed intentions may have a bearing in connection with other facts upon the question of undue influence. But without such facts of a pertinent and forcible character, a change of purpose in making a testamentary disposition of property will not invalidate the will.

Decree of Surrogate affirmed, with costs against appellant.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

## GUARDIAN AND WARD. ACCOUNTING.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

*In re* accounting of Stephen S. Wandell, general guardian.

Decided May, 1884.

The expenditures of a guardian for the support and maintenance of his ward will generally be limited to the income of the fund in his hands; but where the fund is small and a larger sum than the income is necessary for such support the capital may be broken in upon, but only to the extent necessary to answer the just and proper demands of the ward.

The burden of showing such encroachment on the principal to be necessary and proper rests on the guardian on his accounting.

Appeal by Stephen S. Wandell from a decree of the surrogate of

the County of Albany, rendered upon the report of a referee appointed by him to take and state the account of said Wandell as general guardian of Florence L. Craig, formerly Florence L. Pease.

Mr. Wandell was appointed general guardian of the person and estate of Florence L. Pease on the 4th of April, 1872, she being, at that time, about thirteen years old. She was the grand-daughter of William Smith, under whose will she was entitled to a share of his real and personal estate. On a partial division of such estate in 1872 and 1873, the guardian received as his ward's portion, \$9,970.83, which was the only property of the ward that had produced any income applicable to her use, or from which the guardian expected to receive any income. The ward had no other property, except certain contingent interests.

*Smith, Fursman & Cowen, for applt.*

*Alonzo P. Strong, for respt.*

*Held*, That it is the settled and sound doctrine of the law that the income from a fund held by a guardian, belonging to his ward, is the primary fund from which to give support and maintenance to the latter; and the expenditures and disbursements so to be made will generally be limited to the income from the fund.

But where the fund is small, and more means are necessary to the due maintenance of the ward than can be derived from the income, the capital may be broken in upon; only however, to the extent necessary to answer the just

and proper demands of the ward, having in view the amount of the fund and the situation, circumstances and condition of the ward in the particular case.

The burden of showing an encroachment upon the principal fund to be necessary and proper rests upon the guardian, on his accounting, either by the production of an order of the court giving the right, or by furnishing undoubted proof fully establishing the fact.

On and after Jan. 1, 1874 the entire available fund belonging to the ward was \$9,925.17, and the annual income to be depended on from the fund, after that date was \$673.75.

*Held*, That this would seem to be a very respectable sum, in view of the small amount of the fund, for the support and maintenance of a young girl in good health, aged from fourteen to seventeen years. And that a limitation by the referee of the allowance for support during that period of three years to the amount of the income was entirely right.

For the four years following Jan. 1, 1876, an allowance of \$900 annually was made. The amount allowed in diminution of the fund during those years, was \$986.50—an average of \$246.62 per year.

*Held*, That while, for this period, an increase of the allowance might be reasonable and proper, the demand had been met in a liberal spirit by the referee in allowing \$900 annually for support; and in doing so he had exercised his discretion to the full extent sanc-

tioned by public policy and sound judgment.

*Held also*, That the referee was right in refusing a further depletion of the fund by an allowance to the guardian of disbursements, as was claimed in his account.

Decree of Surrogate affirmed, with costs.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

### CONTRACT. RESCISSION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

George P. Norton, *applt.*, v. Lester Yerdon, *respt.*

Decided April, 1884.

Certain facts considered and held not to constitute a mutual rescission of a contract.

Appeal from judgment of County Court, reversing a justice's judgment.

Action to recover \$200 and interest due under a written contract between defendant and one J., plaintiff's assignor. The contract bore date Oct. 23, 1877, and recited that it was for the purchase and sale of land which J. bought of one O., by contract, Aug. 19, 1873, on which land J. had made improvements. By the terms of the contract, J., in consideration of \$295.88, to be paid as therein stipulated, agreed to sell the land with the improvements to defendant, with all the rights to which J. was entitled under the contract with O. Defendant, on his part, agreed to make payments to O.

as stipulated, and to pay J. \$295.88, as follows: \$95.88 down and \$200 in two years, with use; he paid \$95.88 down, and \$14 interest, Oct. 23, 1879. Defendant went into possession after the making of the contract, and continued there until the fall of 1879. The \$200 with interest from Oct. 23, 1879, has not been paid. By the terms of the contract with O., J. was to pay \$200 within eight years, with annual interest, and such payment being made, O. was to give a deed. J. assigned the contract with defendant to plaintiff April 30, 1879; and after defendant left, plaintiff took possession of the premises and put a tenant on them, he having about the same time taken an assignment of the O. contract from O., who told him that defendant would give up the contract. The justice gave plaintiff judgment for \$200 and interest, which the county court reversed on the ground that the acts of the parties amounted to a mutual rescission of the contract in suit.

*Fiske & Powers*, for *applt.*

*Walter Ballou*, for *respt.*

*Held*, Error. On the part of plaintiff and his assignor, the contract had been fully performed, so far as performance on their part was a condition precedent to defendant's obligation to pay. Defendant had been put into possession, and plaintiff or J. had paid the interest on the O. contract as it matured. The principal had not become due on that contract at the time fixed for payment of the \$200 by defendant, and so J.

and his assignee were not then entitled to a deed from O. nor required to give one to defendant. Plaintiff's conduct indicated no intention to rescind the contract or release defendant from his obligations. Defendant abandoned the premises of his own motion, without plaintiff's consent or knowledge. Plaintiff took possession, not by virtue of the contract in suit, but under the contract assigned to him by O., his purchase of which in no wise affected his rights under the contract with defendant.

Coon v. Reed, 1 Hilt., 511; Malony v. Ford, 29 Barb., 454; Havens v. Patterson, 43 N. Y., 218, distinguished.

Judgment of county court reversed, and that of the justice affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### ABATEMENT. BONDS.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John H. Platt, assignee in bankruptcy, *respt.*, v. Amaziah L. Ashman, implead, *applt.*

Decided March 7, 1884.

Under 2 R. S., 6th Ed., 391, § 9, an action or proceeding in favor of a corporation, pending at the time of its dissolution, does not abate by reason of such dissolution, but may be continued in the name of the corporation by a receiver of such corporation in an action to procure its dissolution.

The appointment, under the late bankrupt law, of an assignee in bankruptcy of a corporation after its dissolution did not abate such an action, but under the provisions of

the said bankrupt law and § 121 of the Code of Procedure such assignee had the option either to continue the action in his own name or in that of the corporation.

The fact that a bank teller had already entered upon the performance of his duties when a bond for his good behavior as such teller was signed by the sureties does not deprive such bond of its consideration if the teller had entered upon the duties of his employment with the understanding that such a bond should be given, and if his employment was contingent until that was done.

Such a bond given by a bank teller during his employment as such, to supply the place of a bond of the same kind previously given, which had been lost, is not without consideration if the bank could have terminated his employment if such bond had not been supplied.

Appeal from an order directing John H. Platt, as assignee in bankruptcy, to be substituted as plaintiff in the place of the Stuyvesant Bank, and from a judgment directing recovery by him, as such assignee, of the amount reported due by a referee upon the hearing and determination of the issues.

This action was brought by the Stuyvesant Bank, upon two bonds given by its receiving teller for his good behavior, to recover from the sureties thereon an amount of money claimed to have been misappropriated by said teller. During the progress of the trial a judgment was rendered in an action against the bank dissolving its incorporation and appointing a receiver, and subsequently an assignee in bankruptcy of the bank was appointed under the late bankrupt law. No order was made reviving or continuing the action either in favor of the receiver or of the assignee, and objections were taken to the power of the

referee to proceed with the trial, which were overruled, and the referee proceeded with the action and made a report in favor of the plaintiff. Thereupon an application was made to the court to allow the assignee in bankruptcy to be substituted as the plaintiff in this action, and such application was granted.

*Alvin Burt and F. J. Fithian*, for applt.

*S. K. & F. B. Wightman*, for resp't.

*Held*, That under the authority of 2 R. S., 6th Ed., 391, § 9, the action did not abate by the dissolution of the corporation, and the receiver was entitled to continue its prosecution in the name of the bank. 4 Duer, 362, 478-9.

*Tallmage v. Pell*, 9 Paige, 410, 414, and *McCulloch v. Norwood*, 58 N. Y., 562, distinguished.

The decree in bankruptcy appointing an assignee of the bank did not add any further effect to the judgment previously recovered against the bank adjudging its dissolution, and as the action had not previously abated, this decree in no manner affected the disposition of it, and under § 121 of the Code of Procedure, which was then in force, and the provisions of the bankrupt law, U. S. R. S., 981, § 5047, it was optional with the assignee either to apply to be substituted as plaintiff, or to proceed with the action in the name of the bankrupt.

The liability of the defendant *Ashman* as a surety upon the bonds was resisted upon the ground that, as to him, the bonds were

without consideration. It appeared that the first bond was signed by him after the defendant *McMurray* had entered upon the performance of the duties of receiving teller, and the second bond was given to replace the first, which had been lost, and when it was signed by *Ashman*, *McMurray* was in the employ of the bank as said receiving teller.

*Held*, That while the principal had entered upon the discharge of the duties of his employment it was with the understanding that a proper bond for his good behavior should be given, and until that was done his employment was contingent in its nature, and his relief from that contingency constituted a consideration for the execution of the first bond by this surety.

That if the second bond had not been given when it was required the bank would have been at liberty to have terminated *McMurray's* employment, for it had not obliged itself to employ him for any particular time, and it was to relieve him from that risk that the second bond was given, and that furnished a legal consideration for such instrument.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## APPEAL. PRACTICE.

### N. Y. COURT OF APPEALS.

*Harris v. Van Wart*, assignee, applt., and *Healey*, resp't.

Decided June 10, 1884.

A case on appeal did not appear to have been settled or signed by the trial judge. It contained a paper headed "requests to find," which contained no minute of decision by the judge, and one headed "refusals to find," which contained no refusal, but consisted of exceptions. *Held*, That the exceptions were of no avail.

A statement in a notice to the opposite attorney of a refusal of the judge to find as requested is not of itself sufficient.

The record in the above entitled action purports to contain a case, but there is nothing to show that it was ever settled by the judge before whom the issues were tried, or even that it was presented to him. It is not signed by him. Code, § 997. It contains a paper headed "requests to find," but there is no "note upon the margin" or elsewhere showing how, if at all, the propositions were disposed of. Code, § 1023. It contains a paper entitled "refusals to find," which contains no refusal and consists of a series of exceptions as numerous as the requests in the first paper, similarly numbered, and each of which purports to be taken to an assumed refusal.

*Justus Palmer*, for applt.

*E. P. Wilder*, for respt.

*Held*, That these exceptions cannot avail.

The case contains a notice addressed by the appellant's attorneys to the respondent's, to the effect "that the within is a copy of proposed findings of fact and conclusions of law submitted to the court herein by defendant Van Wart, with a request to find as therein stated, the refusal of the court to find thereon endorsed, and

defendant's exceptions thereto," and it is argued "that if no such refusal had been so endorsed, the statement of such refusal contained in the case would have been sufficient. There was nothing to show that the attention of the judge had been called to the requests, and that he had acted upon them. The findings of the court appear to have been made and filed Jan. 17, 1881, many days prior to the date of the notice.

*Held*, Untenable; that the provisions of the Code, and the rules and practice of the court in such cases relate to matters of substance and cannot be disregarded. 61 N. Y., 391; 22 Hun, 367; 48 How. Pr., 388.

Judgment of General Term, affirming judgment of Special Term, affirmed.

Opinion by *Danforth, J.* All concur.

## CONSTITUTIONAL LAW. SHEPHERD'S FOLD.

### N. Y. COURT OF APPEALS.

*The Shepherd's Fold*, applt., v. *The Mayor, &c.*, of N. Y., respt.

Decided June 3, 1884.

Section 10, Art. 8 of the Constitution has reference to money raised by general taxation throughout the state or revenues of the state or moneys belonging to the state treasury or payable out of it, and not to money raised by ordinary local taxation for local purposes to be disbursed by the local authorities.

The moneys authorized by Chap. 269, Laws of 1871, to be raised and paid to plaintiff were not moneys of the state within the meaning of that section of the constitution. Reversing S. C., 13 W. Dig., 572.

Section 3 of Chapter 269 of the Laws of 1871 provides that the Board of Supervisors of the county of New York, in 1871 and each and every year thereafter, shall levy and collect by a tax upon the taxable property of the city and county of New York, to be levied and collected at the same time and in the same manner as the contingent charges and expenses of the said city and county are levied and collected, the sum of five thousand dollars, and pay the same over to the said corporation (plaintiff) to be applied to the purposes and objects of the said corporation." The corporation was chartered to receive and adopt children and youth of both sexes between the ages of twelve months and fifteen years, who were orphans, half orphans and otherwise friendless, these to keep, support and educate, apprentice and place out to service, trades and schools. Also to receive such children of poor clergymen for training and education who might be deemed eligible and who should be approved by the trustees, and to receive other children and youth for education and training to such extent as in the judgment of the trustees might be expedient. By Chapter 775, Laws of 1868, the several magistrates of the city of New York were authorized to commit to the charge of plaintiff such orphans and friendless children as might come under their jurisdiction, and the commissioners of the public charities and correction of said city were authorized to transfer to the plaintiff such orphans and

friendless children as should be eligible, &c. The act of 1871 provides for placing the children in charge of the society at service, with the approval of the mayor or surrogate or one of the commissioners of public charities and correction of said city.

*A. J. Vanderpoel and Charles E. Miller, for applt.*

*Thomas Allison, for respnt.*

*Held*, That the money authorized to be raised by the supervisors to be paid over to plaintiff was not money of the state within the meaning of § 10 of Article 8 of the constitution, and the act of 1871 was not abrogated by the adoption of that section in 1874; that section has reference to money raised by general taxation throughout the state, or revenues of the state, or moneys otherwise belonging to the state treasurer or payable out of it, 1 R. S., Chap. 9, Art. 1, title 1, and not to money raised by ordinary local taxation for local purposes to be disbursed by the local authorities. The fact that money is raised by local taxation by the supervisors of a county pursuant to an act of the legislature does not make it money of the state. 58 N. Y., 1, 491.

*Also held*, That the legislature had power to authorize the city to provide for the burden assumed by plaintiff, and that which might be cast upon it under the act of 1868, by the payment of a gross annual sum, instead of keeping a separate account of the expense of supporting each child who might be committed or transferred under the act or of each destitute child

living in the city who might be received by plaintiff and who would otherwise have become a county charge. It was not essential that plaintiff's corporate powers should be restricted to the receipt and support of city and county poor to render the appropriation valid.

During the years 1875 and 1876 plaintiff wholly suspended its operation. The claim for those years was disallowed.

*Held*, No error.

Judgment of General Term, affirming judgment on verdict for defendant, reversed, and new trial granted.

Opinion by *Rapallo, J.* All concur.

#### VILLAGES. STREETS. ESTOPPEL.

#### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. H. Delos Johnson, *respt.*, v. The President, &c. of the village of Whitney's Point, *applt.*

Decided May, 1884.

Proceedings by a village incorporated under Chap. 291, Laws of 1870, to open and lay out a street are vitiated by any departure in substance from the formula prescribed by that act.

An omission in the petition of freeholders of the name of one of the landowners renders the petition defective and the proceedings void for want of jurisdiction, even though the land of such owner is very small, unless such owner's claim for damages has been waived.

An entry in the minutes of the board of a motion "that the improvement asked for in the petition be made," is not the entry of the decision of the board to make the improvement by resolution, as required by the

statute. The resolution should be complete in itself so as to show what the improvement was.

If no notice of meeting to hear objections is served on a landowner the trustees have no authority to take his land and are without jurisdiction as to him unless he has waived service.

On an application for a mandamus to compel the trustees to make an assessment and levy a tax for opening a street the trustees are not estopped from gainsaying their acts as being illegal.

Appeal from a judgment in favor of the relator, entered on the report of a referee, directing a peremptory writ of mandamus to issue to the defendants, directing them to make an assessment and levy a tax upon the taxable property and inhabitants of the village for the sum of \$1,198.39, with interest and costs, for damages awarded to Jubez Johnson, because of the laying out of a public street through his lands; the award had been, before the mandamus proceedings were instituted, assigned to the relator.

The village of Whitney's Point was incorporated under the General Act of 1870, Ch. 291, for the incorporation of villages, and the proceedings to lay out and open the street were taken in 1875, under the provisions of that act. The proceedings resulted in the laying out of the street by the trustees, by a resolution entered in the village records, describing the street by metes and bounds; and damages for the lands taken were assessed.

It was claimed that the proceeding to lay out the street was without jurisdiction and void because of fatal informality in its incep-



tion, and void because of omissions of statutory requirements necessary to the preservation of jurisdiction in its continuance.

*Chapman & Lyon*, for applt.

*W. J. Montanye*, for resp't.

*Held*, That proceedings by an incorporated village under the General Act of 1870, Ch. 291, for the incorporation of villages, to lay out and open a street, being entirely statutory, can be maintained only on a substantial observance of the provisions of that act. Any omission in that respect will be fatal to jurisdiction.

Any departure, in substance, from the formula prescribed by the statute vitiates the proceedings under it; and what the legislature has directed to be done in such cases the courts cannot declare immaterial.

A proceeding may be challenged for want of jurisdiction at any time by a party to be affected by it.

If the petition of freeholders in such proceeding omits the name of one of the landowners, the proceeding is without jurisdiction in its very inception, unless such owner's claim for damages has been waived; and this although the piece of land owned by him is very small.

A petition asking for the improvement was received by the board of trustees and placed on file. Then followed this entry in the minutes: "Moved that the improvement asked for in the said petition be made. Motion carried; all voting aye."

*Held*, That this was not an entry

of the decision of the board to make the proposed improvement "by resolution \* \* entered in the minutes," within the purview of the statute; and did not meet its requirements, in form or substance. That there should have been an entry of a formal resolution, and of one so complete in itself as to show what the improvement decided to be made was.

If no copy of the notice, required by the statute to be given by the trustees, of a time and place of meeting to hear objections that may be made to the taking of the land for the improvement, is served upon a landowner, the trustees have no authority to take his land, and are without jurisdiction in that regard unless he has waived service.

The trustees in their order directing the improvement to be made must follow the application as made by the petition. They cannot direct the laying out of the road in part on a different route from that given therein, even though the change be very small.

On an application for a mandamus to compel the trustees of a village to make an assessment and levy a tax for opening a street, they are not estopped from gain-saying their own acts, as being illegal. They have the right and are bound to take advantage of all want of authority to take lands, or make an assessment, both in the inception and progress of proceedings had for that purpose.

A party can never be estopped from raising questions going to jurisdiction.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Bockes, J.*; *Boardman J.*, concurs; *Learned, P. J.*, concurs in the result.

## RAILROADS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Nellie Near, admx, *respt.*, v. The Delaware & Hudson Canal Co., *applt.*

Decided May, 1884.

It is the duty of a railroad company to construct its road bridges &c. of the best material and to use the utmost care and vigilance in keeping them in safe condition. The use of combustible material in the construction of an embankment requires increased care and diligence in keeping the road bed and track in safe condition for use and preventing accidents by fire.

A neglect to keep the road bed and track in the best condition renders the company liable for any injury caused thereby, unless it is shown that the defect could not be discovered by any reasonable skill or foresight.

When a judgment entered upon a verdict in an action for a personal injury, will not be reversed on the ground of excessiveness of damages.

Appeal from a judgment entered upon a verdict, and from an order denying a motion for a new trial. The action was brought by the plaintiff as administratrix of George F. Near, to recover damages for the wrongful acts, negligence and default of the defendant causing the death of her intestate.

The deceased was head brakeman on the defendant's road, and was killed while on duty, because of the breaking down of the track

which was weakened and rendered unsafe by fire, at a certain point where it crossed a marsh upon embankments on the north and south, with trestle-work in the centre. At the place where the south end of the trestle-work connected with the north end of the embankment, there were long timbers laid on and supported by old ties, one end fastened to the bent of the trestle, and the other resting on the bank. The north bent of the trestle settled, from time to time, as did also the end of the embankment, which extended for about 150 feet; and to keep up this embankment immediately south of the trestle, the defendant from time to time, piled in a great quantity of old ties, and left in there other combustible material. This place was called a sink-hole. The marsh-grass in the vicinity at the time of the accident was quite dry, as was also the combustible material employed to keep up the grade and to give support to the rails. On the day of the accident the marsh-grass near by was on fire; and in the afternoon and evening, the old ties and combustible material which gave support to the timbers under the rails were also on fire. No one was stationed at or near the trestle to guard it against fire or otherwise. A train of cars reached this point about 9 p.m. The supports of the rails at the sink-hole had then become so weakened by the fire that the track gave way, and the engine on which the deceased was riding, was wrecked and the deceased killed.

The plaintiff obtained a verdict for \$5000.

A motion was made for a new trial, and denied.

*Henry Smith*, for applt.

*James W. Verbeck*, for respt.

*Held*, That the case was eminently one for the jury, on the proof, upon the question as to the defendant's negligence; that defendant was guilty of negligence both in the mode of constructing the work originally and in omitting to guard against fires and other accidents and that under the circumstances the damages were not excessive.

Although a railroad Company has the right to use combustible material in constructing an embankment, yet the use of such material requires increased care and diligence in maintaining the road-bed and track in a safe condition for use, and preventing accidents by fire.

The duty owing by a railroad Company to the public, as well as to those in its employ, is that its road and bridges and other appurtenances shall be constructed of the best material; and the utmost care and vigilance be bestowed in keeping them in safe condition. The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires.

It is its duty to keep a sufficient force at command, and of capacity sufficient, to discover defects and apply the remedy. Neglecting to keep it in the best condition, if injury or loss occurs thereby, the Company will be liable. And

from this responsibility it cannot be relieved, except by showing that the defect was one which could not be discovered or remedied by any reasonable skill or foresight.

Whether the negligence of the person injured, or the negligence of his co-servant contributed to the injury, is a question for the jury to determine. It cannot be adjudged as matter of law.

Judgment and order affirmed, with costs.

Opinion by *Bockes, J.*; *Learned, P. J.*, and *Boardman, J.*, concur.

#### BAR. APPEAL. PARTIES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Rufus Snyder, respt.*, v. *Robert Bliss et al.*, *appls.*

Decided May, 1884.

An order denying a motion to make the sheriff a party, which is not appealed from, concludes the parties, and such order is not brought up by an appeal from the final judgment when the notice of appeal does not state that it was intended to do so.

An objection of a defect of parties, when it appears on the face of the complaint, is waived by an omission to demur for such cause.

A sheriff holding attachments against property involved in an action of interpleader, is not a necessary party to it.

What is sufficient proof of the existence of a foreign corporation as such?

Appeal from a judgment entered upon the report of a referee in an action of interpleader brought to determine which of the parties defendant were entitled to a fund of \$326.95, which was admitted by

the plaintiff to be due from him for powder furnished to him by the Ditmar Manufacturing Company.

There were two classes of claimants to this fund, claiming under different titles; one class claiming under attachments issued against the plaintiff, and the other under an assignment from an alleged partnership—not from the Ditmar Corporation. The appellants insisted that there was no such incorporated company, and further, even if there was, then that they had shown, by the proof, that the indebtedness was not contracted with that company, but was contracted with the partnership under which they made their title. These questions were made questions of fact on the trial, to be determined by the referee on the proof submitted. He found them against the appellants. There was abundant proof of the existence of the corporation, and that the plaintiff's indebtedness arose out of his dealings with it, and was in fact an indebtedness by him to the company. The company was a foreign corporation organized under and pursuant to the laws of California. This was proved by the production of its articles of incorporation, duly certified to, authorize them to be read in evidence. The corporation had an office in the City of New York, and conducted its business there and elsewhere in this State. There was a certificate of its incorporation hanging on the wall in its office in the city. It had officers—a president, secretary, etc., and

kept books, and there were stockholders. It employed an attorney to represent it in suits, and it was sued and defended suits in its corporate name, leased property and paid taxes. The proof also showed that Snyder, the plaintiff, made his purchases of property from the corporation and thus became indebted to it, as in the complaint stated. The court held that the finding of the referee as to the existence of the corporation, and his decision awarding the property to the attaching creditors, was correct.

*W. H. Peckham*, for appls.

*J. Newton Kiero* and *J. L. Kellogg*, for resp't.

*Held*, No error; that there was sufficient proof of the existence of the corporation.

It was alleged by the appellant as a ground of error, that there was a defect of parties in this, that the sheriff was a necessary party. It appeared that upon a motion previously made in the action, to bring in the sheriff as a party defendant, the question was decided against the appellant by an order denying the motion.

*Held*, That such former adjudication not having been appealed from, concluded the parties.

*Held also*, That the appeal from the judgment did not bring up the question decided in that order, as it was not stated in the notice of appeal that it was intended to bring up such intermediate order, or the matter then decided, for review.

That the objection of a defect of parties, when it appears on the

face of the complaint, is waived by an omission to demur for such cause.

That a sheriff holding attachments against property involved in an action of interpleader, having no interest in the subject matter of such action, is not a necessary party to it.

Judgment affirmed, with costs against the appellants.

Opinion by *Bockes, J.*; *Boardman, J.*, concurs.

### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Obadiah Stephens, *applt.*, v. Peter Cornell, *respt.*

Decided April, 1884.

The answer set up as a counterclaim an account against plaintiff's father, which, it was alleged, plaintiff had agreed to pay in consideration of the conveyance of certain property by the other heirs. *Held*, That defendant was not an incompetent witness under § 829 of the Code to prove such indebtedness.

The question as to whether a claim is barred by the statute of limitations is not to be passed upon in receiving or rejecting evidence to establish the original existence of the claim.

Appeal from judgment of county court, reversing judgment in justice's court in favor of plaintiff.

Action on an account. The answer set up, as a counterclaim, an account which accrued in favor of defendant against plaintiff's father in his lifetime and also alleged that in consideration of property conveyed to him by the other heirs at law of his father, plaintiff had

undertaken and agreed to pay the debts of his father including the one held by defendant.

Plaintiff proved his account. Defendant, in endeavoring to establish his counterclaim, sought to testify to and offered to prove such indebtedness. This was objected to on the ground that defendant was not a competent witness under § 829, Code Civ. Pro. The justice ruled out the evidence.

*P. J. Hulett*, for applt.

*Burrell & Robinson*, for respt.

*Held*, That the justice erred in excluding the evidence and that the county court properly, for that reason, reversed his judgment.

Plaintiff was not a party as an executor or administrator or heir at law of his father; he sued in his own right. Defendant's counterclaim was not against plaintiff as executor or heir at law; but it was against him in his individual personal capacity. Therefore § 829 had no application. 22 Hun, 444; 92 N. Y., 247.

Plaintiff is not a party deriving title or interest from, through or under a deceased person. If he covenanted to pay a debt held by defendant he was liable because of the covenant. 24 N. Y., 178; 20 id., 268.

Whether plaintiff was liable to pay the debt held by defendant depended upon his personal promise made at the time a fund was put in his hands by the heirs at law of the deceased and which plaintiff agreed to apply in liquidation of the indebtedness of his

father. Plaintiff in performing that agreement would have done nothing more than to pay his own debt in the manner in which he had agreed to pay it. 47 N. Y., 241.

That whether the claim ought to be established was barred by the statute of limitations ought not to have been determined by the justice in considering whether he would receive evidence to establish the claim. The objection to a defence or counterclaim can be taken only by reply. Code, § 413. It is a matter that goes to the merits and is not to be passed upon in receiving or rejecting evidence to establish the original existence of a debt or claim.

Besides if the account set up by defendant was a running one it was not barred even as against the estate of the deceased. But the promise relied upon by defendant was made long after the death and was not barred.

Judgment of county court affirmed.

Opinion by *Hardin, J.; Smith, P. J.*, and *Barker, J.*, concur.

#### AGENCY. CONTRACT. VERDICT.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Edmund Earl, *respt.*, v. Porter  
P. Collins, *applt.*

Decided April, 1884.

Where an agent, acting within his authority, signs a contract without disclosing his principal's name, the validity of the contract is not affected.

It is not error to allow the reduction of a verdict after it is entered to the amount of damages claimed in the complaint.

Appeal from county court judgment on verdict, and also from an order of that court denying motion for new trial on the minutes and giving plaintiff leave to remit part of the verdict and take judgment for the residue.

Action began in justice's court for money had and received. Plaintiff recovered judgment for \$192 and costs, and defendant appealed to county court, where plaintiff had verdict for \$222. After entry of verdict, and before judgment, plaintiff was allowed by the court to file a stipulation reducing the verdict to \$200, the amount of damages claimed in his complaint, and thereafter he entered judgment for that amount, with costs. Plaintiff had land in Michigan, which he had authorized Leonard Collins, defendant's brother, who lived near the land, to sell for him. In October, 1872, defendant, being about to visit his brother, plaintiff asked him to sell his farm when he got there, and offered him all he could sell it for over \$1,850, and consented that if defendant had to take stock in pay, he would take a horse of him at \$200. Defendant returned the last of October and told plaintiff he had sold the farm for \$2,000, and had taken stock in part payment. Relying on that statement, plaintiff took a horse at \$200, received \$200 in cash, and defendant retained \$150 for making the sale. Plaintiff afterward learned that defendant's brother had sold the land for

\$2,000 some two months before defendant went there; that a contract for the sale had been executed and \$109 paid down by the purchaser; that defendant persuaded his brother to call with him on the purchaser and told the latter that plaintiff had sent him to see if he had not more money he could pay down; that defendant had a new contract executed, with the same purchase price, the payment down being fixed at \$550, and the date made to correspond with the time when he was in Michigan. The purchaser paid \$450 cash, which, with \$100 paid on the first contract, was handed to defendant to bring to plaintiff. Defendant took no stock from the purchaser. The original contract was signed "Leonard A. Collins, Agent." It did not, in terms, bind the party of the first part to "sell and convey," but provided that he should furnish a warranty deed, and that the second party was to have possession, etc. The aggregate price to be paid was not expressed in the writing, but was supplied by parol proof at the trial.

*D. D. Metcalf*, for applt.

*S. N. Dada*, for respt.

*Held*, That plaintiff was bound by the original contract, which was valid, 64 N. Y., 362, and he could adopt and enforce the contract, even if it had been signed by the vendee alone. 1 Seld., 229. The parol proof was admissible, its effect being, not to vary the writing, but to show what the contract was as to consideration. Moreover, the parties to the con-

tract recognized it as valid, and the new contract was substituted wholly at defendant's suggestion. Such sale being made without his agency, defendant was not entitled to the \$150, and is liable for it to plaintiff. Plaintiff is not liable for the expenses of defendant's journey, which was made on his own account, and there is no proof of the value of defendant's services in collecting the money and delivering it to plaintiff.

Interest is to be allowed from the date of defendant's first interview with plaintiff after his return, at which time it was his duty to render an account.

It is common practice to allow an amendment of the verdict after it is entered and before judgment. 3 Wend., 356; 2 Seld., 97; 7 How., 21, and cases cited by Harris, J.

Judgment and order affirmed, with costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### PRACTICE. LEASE. ASSIGNMENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Patrick Riley, *respt.*, v. Pliny T. Sexton, *applt.*, and John I. Stebbins, *impld.*, *respt.*

Decided April, 1884.

A general exception to a referee's findings is unavailing unless all the rulings embraced in it are erroneous.

Where the reversioner and lessor assigns to a third person the written obligation of the lessee to pay rent, the thing trans-

ferred is a mere chose in action, and the assignee has no occasion to inquire as to the contents of a real estate mortgage which professes to pledge rents and profits.

Appeal from judgment on referee's report.

Action in the nature of a creditor's bill brought by plaintiff as judgment creditor of James Murray and James Lawless, to compel application to the payment of plaintiff's judgment, of Murray's share in certain rents reserved in a lease of lands executed by James Murray and John Murray to plaintiff and his son Richard. The Murrays owned two farms in common, and on Feb. 9, 1878, they executed a written lease of one farm to the Rileys for five years from April 1, 1878, at \$700 a year, payable Dec. 1st in each year. Of the rent maturing Dec. 1, 1880, \$583 was assigned by the lessors to defendant Stebbens, April 1, 1880. On June 1, 1879, defendant Sexton took from the Murrays a mortgage on the farms and other land, for \$15,000, containing this provision: "And they do also pledge as additional security, the rents, issues and profits of said premises;" and it was also agreed that while the debt exceeded \$10,000, the mortgagors would, whenever desired, execute to the mortgagee chattel mortgages upon all growing crops and on personal property generally, then owned by them. That mortgage was recorded Dec. 3, 1879. On July 3, 1879, the mortgagors executed to Sexton their chattel mortgage for \$10,000, on all their personal property whatever, and growing crops

of all kinds on said farms, which mortgage was duly filed about the time of its date, and duly refiled July 6, 1880. Stebbens knew that Sexton had said \$15,000 mortgage, but he had never seen it nor the record of it, and did not know that it contained a special clause purporting to give a lien on crops or rents, issues and profits, nor had he heard that Sexton had any claim on the lease. The referee found that Stebbens is entitled to \$583, rent due Dec. 1, 1880; that plaintiff is entitled to have the remainder of the rent due, and to grow due, applied on his judgment and costs, and Sexton is not entitled to the same; that plaintiff is entitled to an injunction restraining Sexton and James Murray from collecting Murray's share of said rent; that a receiver be appointed and that plaintiff and Stebbens are entitled to their costs of the action to be paid by the receiver out of the moneys to be collected by him on said lease. Appellant's only exception is this: "The defendant, Pliny T. Sexton, excepts to each of the findings of law of the referee in this action."

*Charles McLouth*, for applt.

*John Gillette, Jr.*, for plff. respt.

*Comstock & Bennett*, for deft. respt.

*Held*, To say that a general exception to several rulings is of no avail whatever, is stating the rule too broadly; the cases go only to the extent of saying that such an exception is unavailing unless all the rulings embraced in it are er-



roneous. 50 Barb., 410; 14 N. Y., 535.

Whether Stebbins is entitled to the rent due Dec. 1, 1880, depends upon whether he is chargeable with notice that Sexton had a prior lien upon the rents. The description in the chattel mortgage is so indefinite that it cannot be said to amount to notice of such lien. Stebbins was not purchasing an interest in real estate, and so was not put upon inquiry as to the contents of Sexton's real estate mortgage. Although rent to grow due is regarded as realty as between the grantor of the reversion and his grantee, 14 Barb., 654, yet, where one who is owner of the reversion and also lessor transfers to a third person the written obligation of the lessee to pay rent the thing transferred, as between them is a mere chose in action, and not real estate. 29 Barb., 145; 4 Kent's Com. (7th Ed.), 518; 3 Johns., 216; 46 Barb., 282.

Appellant contends that Stebbins claim against his co-defendant Sexton cannot be litigated in this action, inasmuch as Stebbins has not complied with the requirements of § 521, Code Civ. Pro., in respect to demanding relief in his answer and serving the answer on Sexton's attorney before trial. Sexton has waived that objection, as he might do. 90 N. Y., 396, 400, 401. The appeal book does not show that the objection was taken at the trial, and the referee determined the question without any allusion being made by any one to the form of the answer.

As the referee's conclusion re-

specting Stebbin's rights is correct, the general exception is not well taken.

Judgment affirmed, with costs of appeal to each respondent, to be paid by appellant.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

### GIFT. TITLE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Rhoda Ann Stokes, *applt.*, v. Silas Pease, *respt.*

Decided April, 1884.

Plaintiff's mother sold certain premises to defendant and took back a mortgage payable to plaintiff after the mother's death. This mortgage remained in the mother's possession until it was surrendered to defendant. *Held*, That a gift to plaintiff of the debt or mortgage was not consummated, and that she had no title thereto.

Appeal from judgment of Special Term dismissing complaint.

Action to recover a mortgage of \$2,000, executed by defendant and payable to plaintiff.

The court found that plaintiff's mother, in 1871, conveyed certain real estate to defendant and took back a purchase money mortgage for \$2,000, payable in one and two years after the mother's death; that the mortgage was so executed at the request of the mother, who paid the consideration; that the mortgage was delivered to the mother and remained in her possession until about 1877, when she delivered it to defendant; that there was no delivery of the mortgage by the mother or defendant

to plaintiff, or to any other person for her, in trust or otherwise, and that the mother died in 1879, and found as conclusion of law, that the mortgage never had any legal inception or existence as between plaintiff and defendant or plaintiff's mother.

*S. E. Payne*, for applt.

*Hurlbert & Underwood*, for resp't.

*Held*, No error; that plaintiff showed no title to the mortgage entitling her to a decree requiring defendant to deliver it over. Whether the mother had actually given the mortgage to plaintiff and effectuated her intention to make such a gift by delivering it to defendant as agent or trustee for plaintiff, was a question of fact, and there was such a conflict in the evidence that we do not feel warranted in reversing the finding of the trial judge, who saw the witnesses, observed their appearance and judged where the truth was. 65 Barb., 214; 3 Keyes, 323; 80 N. Y., 436.

Doubtless the mother entertained an intention to make a gift of the mortgage to plaintiff, but she did not effectuate the intention by a delivery to plaintiff in her life time, and until such a delivery was actually made the security was under the control of the mother, who had furnished, by a deed of her land, the consideration for it, and she was the owner of the debt for the unpaid purchase money secured by the mortgage until she, by her acts, had parted with the debt and the mortgage, which was

an incident of the debt. 20 Wend., 43; 41 N. Y., 416; 58 id., 192. The mother in this case seemed to keep control of the mortgage and omitted to put it out of her hands in her life time by a delivery to plaintiff, and omitted to furnish to plaintiff possession of the evidence of the debt for the unpaid purchase money, and therefore a gift of the debt or the mortgage to plaintiff never was consummated. 10 Mass., 456; see 88 N. Y., 526.

*Martin v. Frink*, 75 N. Y., 143, distinguished.

The evidence showing that the mother had the mortgage in 1876, and then surrendered it to defendant, indicated very clearly that she did not understand that she had ever parted with the title to it, or that she had herself become a trustee for her daughter in respect to it. It was an act of the mother wholly inconsistent with the idea that she had made an absolute gift of it, or had assumed to hold it as trustee for plaintiff. It tends strongly to support the findings of the trial judge. What her intention in the premises was was a question of fact. 80 N. Y., 436.

It clearly appears that plaintiff had not parted with any value for the mortgage, and she had no beneficial interest in it. She could only assert such interest or ownership as she could demonstrate her mother had conferred intentionally and actually upon her.

Judgment affirmed, with costs.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## NEGLIGENCE. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Margaret Hartel, *respt.*, v. James Holland, *applt.*

Decided April, 1884.

Persons driving along a highway have a right to rely on the exercise by other persons of ordinary care and prudence in managing their team while passing.

Plaintiff was injured by a collision with defendant's wagon, caused by the latter's negligence, whereby she was thrown out of the wagon and suffered a miscarriage in consequence of the shock. She was a married woman, but her husband allowed her to enjoy whatever wages or profits she could earn outside of her domestic services. *Held*, That the action was properly brought in her name; that evidence as to what wages or money she could earn before her injuries was admissible and that a verdict of \$200 was reasonable.

Appeal from judgment entered on verdict for plaintiff and from order denying motion for a new trial on the minutes.

Action to recover for injuries caused, as alleged, by defendant's negligence. Plaintiff while driving into the city of Rome met defendant with his team and a load of logs and a collision took place, by which plaintiff was thrown from her wagon and injured and in a day or two suffered a miscarriage, alleged to have been in consequence of the shock.

The complaint alleges that plaintiff sustained injuries "in and about her body;" that "she has ever since been prevented from attending to her business and has been and will be put to expense in endeavoring to be healed of her injuries for medicine, doctor's bills,

&c., and that she has and will suffer greatly in body and mind as the result of her injuries." There was no demurrer.

There was evidence to sustain a finding that plaintiff was free from contributory negligence. As to defendant's negligence the evidence was conflicting and that question was left to the jury. Defendant's evidence tended to show that plaintiff's horse sheered or turned towards defendant's team just as the wagons were passing each other. This was controverted by plaintiff's testimony.

*Jas. I. Sayles*, for *applt.*

*Jas. Parks*, for *respt.*

*Held*, That the question of defendant's negligence was eminently a proper one for the jury. 83 N. Y., 574; 92 id., 640. 80 id., 622, and we do not feel at liberty to disturb the verdict founded on conflicting evidence as to the circumstances attending the collision.

Plaintiff had a right to rely upon defendant's using ordinary care and prudence in managing his team while passing her, and of course she was to exercise the like care. 1 E. D. Smith, 78; 30 N. Y., 208; 23 Conn., 339.

Plaintiff gave evidence tending to show that she picked berries and did work outside of her family with the assent of her husband, who allowed her to retain and have the results of her separate labor.

*Held*, That the action was properly brought in her name. Code Civ. Pro., §§ 450, 1206.

She was allowed to show, under objection, what wages she could

get or money earn before her injuries.

*Held*, No error. There was no exception to the inquiry as to how much per day her services were worth, nor any objection calling on the court to rule that she could not recover for the loss her husband might sustain by reason of her incapacity to perform domestic duties.

As the complaint alleged loss to her by reason of impairment of her health, and as she was suffered by her husband to enjoy whatever wages or profits she derived outside of the domestic service the evidence was admissible. 54 N. Y., 343.

Reynolds v. Robinson, 64 N. Y., 589, distinguished.

*Also held*, That the verdict of \$200 was a moderate compensation for the injuries if they were anything like what the evidence disclosed.

Judgment and order affirmed.

Opinion by *Hardin, J.; Smith, P. J.*, and *Barker, J.*, concur.

### MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Mary Oyer et al., *respts.*, v. Simon Oyer, implead, *applt.*

Decided April, 1884.

Defendant executed a purchase money mortgage, collateral to a bond conditioned to pay the principal sum to A. V. O., and the interest thereon, or on so much thereof as might remain at any time unpaid, to plaintiffs. The bond and mortgage were sold by the receiver of A. V. O. to one C., who executed a satisfaction thereof for less  
Vol. 19.—No. 14.

than the principal sum, and delivered it to defendant. *Held*, That the satisfaction was ineffectual to cut off the rights of plaintiffs in the mortgage, and that they were entitled to foreclose it to reach the share of the fund owned by them.

Appeal from judgment in favor of plaintiffs, entered on decision of county court, after trial without a jury.

Action to foreclose a purchase money mortgage for \$3,000, executed by defendant in 1874. The bond was conditioned to pay said sum to Augustus V. Oyer, his attorney, etc., in ten equal annual instalments, the first to be paid February 1, 1880, with annual interest on said sum, or so much thereof as shall from time to time remain unpaid \* \* until said sum shall be fully paid. "The said interest moneys are hereby made payable to Mary Oyer and David Oyer, and the survivor; but in case both of them shall depart this life before the whole thereof becomes due and payable" then to Augustus, his administrators, etc.

One S. was appointed receiver of Augustus in supplementary proceedings, and sold the bond and mortgage in question on February 17, 1877, to one C., the highest bidder, for \$1,880. On the same day C., for \$1,880 and \$5 for his trouble, executed a satisfaction of the mortgage and delivered up the bond and mortgage to defendant. The interest up to the date of the sale was paid to plaintiffs, but no other principal or interest has ever been paid.

The county court found that plaintiffs were entitled to recover

interest on \$1,115, the difference between the face of the mortgage and the sum paid for such satisfaction, from February 17, 1877, to February 1, 1881, and also to recover interest on said sum to February 1, 1886, and on \$900 for one year, to be paid February 1, 1887, on \$600 to be paid in 1888, and on \$300 to be paid in 1889.

*Vedder & Rider*, for applt.

*Torrance & Allen*, for respts.

*Held*, No error. The fact that some of the \$3,000 remained unpaid left the covenant in the mortgage operative and available to Mary and David. It is found as a fact that only \$1,885 was paid, with interest, to February 17, 1877. It follows that \$1,115 remained of the \$3,000 unpaid. No reservation is given in the bond and mortgage of the right to pay the larger sum with a smaller one. The position of defendant would require us to hold that a payment of \$1,885 operated as an extinguishment of the \$3,000 debt, and to transpose and alter the terms of the bond and mortgage.

The debtor expressly stipulated to pay *interest* on the \$3,000, or such part of it as should remain unpaid, to Mary and David, and to that extent they had an interest in the bond and mortgage. The purchase money in arrear and secured by the mortgage was a fund in the hands of the mortgagor which he stipulated to pay, together with interest on it, in a particular manner. 24 N. Y., 178; 47 *id.*, 241. As the terms of the mortgage and bond were known to defendant, he is char-

geable with knowledge of the rights of plaintiffs. Indeed he assented to an assignment to them of such interest as might, under the terms of his covenants, accrue to plaintiffs. They may be considered assignees of the interest defendant had agreed to pay, and any payment thereof by him to any other party was in defiance of his covenants. That it was not necessary to set aside the satisfaction which was given, but that such satisfaction was ineffectual to cut off the rights of plaintiffs in the mortgage, and that according to their interest in it they were entitled to foreclose it to enable them to reach that share of the fund owned by them which defendant sought to turn aside and keep out of their hands.

The complaint alleged that the bond and mortgage were executed to Augustus, Mary and David. The instruments were received in evidence under objection.

*Held*, That there was not a fatal variance, and that defendant was not misled by the averment. Code, § 541. There was no proof that he had been misled. *Id.*, § 539.

Judgment affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## NEGLIGENCE. DAMAGES. EVIDENCE.

### N. Y. COURT OF APPEALS.

*Strohm, an infant, respt., v. The N. Y., L. E. & W. RR. Co., applt.*

Decided June 17, 1884.

To entitle a plaintiff to recover present damages for apprehended future consequences of an injury there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Evidence by an expert as to consequences which are "very likely" to result from an injury, or as to what may be developed therefrom, is inadmissible.

This action was brought to recover damages for injuries received by plaintiff while a passenger on one of defendant's ferryboats, which resulted from a collision between it and a schooner. A physician who had personally examined the physical condition of plaintiff, and had received from him an oral statement of his symptoms, and had also been asked a hypothetical question, embodying a description of the apparent conditions and symptoms exhibited by plaintiff since the injury, as claimed by plaintiff's counsel to have been established by the evidence, was asked what the symptoms related to him and those described in the hypothetical question indicated and he answered that the elements of the hypothetical question proved epilepsy, while those related by plaintiff left that matter open, leaving it either as a preliminary stage of epilepsy or meningitis or traumatic dementia, the witness could not decide which. Being afterwards asked as to the permanency of the condition of the plaintiff he stated that it was very likely to be permanent. Plaintiff's counsel then asked him: "What do you mean by 'very likely'?" and he answered: "I mean that the boy

will always have some remnants of this injury, some reminder of it, great or small, that is certain; how much he will retain I cannot tell, but I think it likely he will retain."

Here the witness was interrupted by an objection by defendant's counsel to the words "very likely" and what follow, as entirely too speculative. The objection was overruled and an exception taken. The witness then answered that the plaintiff was likely to retain the greater part of the symptoms if he did not develop worse signs. He was then asked: "You said it might develop into worse signs or conditions. What do you refer to?" This question was objected to as speculative and hypothetical. The objection was overruled and an exception taken, and the witness answered: "A patient sustaining such injuries and presenting such premonitory signs may develop traumatic insanity, or meningitis, or progressive dementia or epilepsy with its results."

*B. F. Tracy*, for applt.

*Samuel Hand*, for resp't.

*Held*, That the objections were improperly overruled; that future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded, but to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue, consequences which are contingent, speculative or merely possible are not proper to be consid-

ered in ascertaining the damages. It is not enough that the injuries received may develope into more serious conditions than those which are visible at the time of the inquiry, or even that they are likely to so develope. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. 18 N. Y., 541; 49 id., 45; 18 Wend., 229; 23 Wend., 425, 435.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Rapallo, J.* All concur, except *Ruger, Ch. J.*, and *Danforth, J.*, dissenting.

### FALSE PRETENSES.

#### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Baker, *applt.*

Decided June 24, 1884.

To constitute the crime of false pretences there must be proof that the pretences were made with intent to cheat and defraud another and that the property was parted with upon and under the inducement of the false pretences alleged. Mere silence, suppression of the truth, or withholding of knowledge on which another may act is not sufficient.

Defendant was tried and convicted in the Rensselaer County Sessions for obtaining of one M. on March 30, 1876, \$575 by false pretences. It appeared that in and prior to March, 1873, M. was

a Methodist minister, and B., defendant, a reputable merchant of considerable means, and his business affairs said to be skilful and sagacious. They and their families were on terms of intimacy. M. learned that B. sometimes dealt in stocks and had made money for himself and others in that way. B. consented to operate in stocks for M. as his friend and without compensation, and it was agreed that B. should buy for M. through his brokers one hundred shares of N. Y. C. stock on a margin of \$2,000 and carry it until he could pay for it. M. had about \$10,000 invested in small sums, and it was arranged that as fast as he could get it collected he was to pay it to B., who was to pay it to his brokers, or use it in his business, allowing interest upon it, or in speculating in other stocks for M., the profits of which were ultimately to be used in paying for the N. Y. C. stock, which M. desired to hold as an investment. March 28, 1873, B. wrote M. acknowledging the receipt of money to be used as a margin and expressing his views as to the market and stating that his judgment was not infallible. M. replied, speaking of his resources and wishing to know how long he would carry the 100 shares on payment of \$2,000 by him, and expressing a preference for certain stock and asking B. to do by him as he would by himself. On April 9, 1873, before B. received all of the \$2,000, he purchased through his brokers the 100 shares of N. Y. C. at a total cost of a little over \$10,000 and reported the purchase to

M. They met soon after and B. told M. he need not hurry up his collections or incommode himself, as the stock had been purchased. They did not meet again for a year and a half, but conducted their business by letter. M. from time to time sent money, suggesting to B. to use it for speculating in Western stocks so as to make money to aid in paying for the N. Y. C. stock. B.'s letters acknowledge the receipt of the money, gave his opinion about stocks and he sent statements of the account between them. When the stock was paid for M. was to have the stock certificate. On March 11, 1874, after B. had received of M., including dividends credited, about \$5,000, B., being pressed by his financial necessities, without the knowledge or consent of M., sold the stock. After that M. continued to send money to B. to apply on the stock, and B. continued to acknowledge receipt of the money and to send statements to M., showing credits for the money and for dividends as if made on stock actually held by him. In a letter dated March 12, 1875, B. advised M. not to sell the stock until times were better, and told him he would carry it as long as he wished. On March 15th he repeated this advice. In the fall of 1875 M. met B. and proposed to make future payments directly to the brokers, and B. suggested that as he had had charge of the matter and as some discrepancy existed between him and the brokers about the account he should continue to make his payments to him. On January

12, 1876, B. wrote M., giving him a statement of his credits for dividends upon the stock, besides credits for several payments of money, and closed with an expression of encouragement as to the market for stocks in the future. Without any further meeting or communication between them, on March 30, 1876, M. sent \$575 to B., for which he gave a receipt. Afterwards M. continued to send money to B., the receipt of which he continued to acknowledge. This continued until April 13, 1877, when B. gave M. a receipt for a small sum which was stated to be in full payment for the 100 shares of stock. A correspondence continued between M. and B. into 1879, which showed that B. was financially embarrassed but was hopefully struggling to come out all right. In the end he became insolvent. B. at no time asked M. to pay any sum, and the only false representations were contained in the statements in the accounts sent to M. by B. on and prior to January 12, 1876.

*G. B. Wellington*, for applt.

*Edgar L. Fursman*, for respnt.

*Held*, That B. was not guilty of the crime charged; that the sale of the stock without his knowledge or consent, at most, amounted to a conversion.

To constitute the crime of obtaining property by false pretenses there must be proof that the false pretenses were made with intent to cheat and defraud another, and that the property was parted with upon and under the induce-



ment of the false pretenses alleged.

Mere silence and mere suppression of the truth, the mere withholding of knowledge upon which another may act, is not sufficient to constitute the crime of false pretenses.

Judgment of General Term, affirming judgment of conviction, reversed, and new trial granted.

Opinion by *Earl, J.*; *Rapallo, Danforth* and *Finch, JJ.*, concur. *Miller, J.*, reads dissenting opinion; *Ruger, Ch. J.*, and *Andrews, J.*, concur.

#### WILLS.

##### N. Y. COURT OF APPEALS.

*Wager et al., respts., v. Wager, implt., applt.*

Decided June 3, 1884.

Testator by his will gave the use of \$4,000 to his widow for life, with privilege to use the principal if necessary; he then gave the residue of his property, together with what should remain of the \$4,000, to his daughter S., and provided, in case of the death of S. without issue before the widow, that all the property left by the daughter "at her death which shall belong to me at my death," together with what should remain of the \$4,000, should go to the widow. S. died before the testator. *Held*, That the intention of testator was to give to the survivor the entire estate undisposed of on the death of either, and that only a life estate was given to the daughter.

Reversing S. C., 16 W. Dig., 460.

This action was brought to procure a construction of the will of W., deceased. The will in terms assumed to dispose of all of W.'s property and expressly provides the persons by whom and the con-

tingencies upon which he intends it shall be taken. The only legatees mentioned are W.'s wife and daughter, who it was provided should take his entire estate on his decease. Alternate provisions were made for each depending upon the event of one surviving the other. W. gave to his wife \$4,000, about one-third of his estate, for life, with privilege of using the principal sum if she deemed it necessary for her support and comfort. The residue, with what remained of the \$4,000 after the death of his wife, he gave to his daughter, but without words of inheritance or express language indicating an intention to give her an absolute estate, and in case of her death "leaving no issue before the death of my said wife \* \* \* all the property, both real and personal, that shall be left by my daughter at her death, which shall belong to me at my death, I give, together with what shall remain from the above-mentioned four thousand dollars, devise and bequeath to my beloved wife, to her use, her heirs and assigns forever."

*E. A. Nash*, for applt.

*J. & Q. Van Voorhis*, for respts.

*Held*, That it seems to have been the intention of the testator to give, to the survivor of the two legatees named in the will, the entire estate left by him, remaining undisposed of on the death of either legatee; that although the language employed in making the devise to the daughter would generally import an absolute estate in the property, yet the crea-

tion of a limitation over clearly intended to deny her the power of disposing of it by will, and the force of the testator's intention as derived from the provision for a remainder in the wife, and the scope and design of all its provisions, fairly imply an intention on his part to confer a life estate only on the daughter.

If provisions in a will are couched in inexact and ambiguous phraseology it is the duty of the courts to so construe them as to effectuate the general intention of the testator as derived from an examination of the whole instrument. 53 N. Y., 236; 47 id., 512.

When the provisions of a will are irreconcilably conflicting one must give way to the other, and that must be adopted which seems to accord most clearly with the testator's primary object in executing the instrument; but when by limiting the character of the first estate the second may also be preserved it is the duty of the court to do so, unless such a construction is subversive of the general scheme of the will or forbidden by some inflexible rule of law. 13 N. Y., 273; 64 id., 278.

An ulterior devise in a will to take effect upon the defeasance of a former one will attach as well when the failure of the primary devise is by the happening of some event, such as the death of the devisee, during the lifetime of the testator, as by an event occurring after his death by which the first devise after it has taken effect is defeated, unless the ulterior devise is so connected with and

dependent upon the primary one that it cannot consistently with the provisions of the will have effect if the latter fails *ab initio*. 70 N. Y., 81; 23 id., 366.

Judgment of General Term, reversing judgment of Special Term dismissing complaint, reversed, and judgment of Special Term affirmed.

Opinion by *Ruger, Ch. J.* All concur, except *Rapallo* and *Andrews, JJ.*, dissenting.

#### N. Y. CITY. NEGLIGENCE. EVIDENCE.

##### N. Y. COURT OF APPEALS.

*Ehrgott, applt., v. The Mayor, &c. of N. Y., respt.*

Decided June 10, 1884.

The exclusive control over the annexed district given by the Act of 1873 to the Park Commissioners is not exclusive of the city, but of any other officers of the city, and the municipality is liable for their misfeasance or nonfeasance in the discharge of any corporate duty resting upon it.

In an action to recover for injuries evidence as to plaintiff's earnings prior to the injury are admissible.

Allegations in a complaint that plaintiff suffered great bodily injury, became sick, sore and disabled, obliged to spend large sums in attempting a cure, was prevented from attending to business and was otherwise injured, are sufficient to authorize proof of any bodily injury resulting from the accident.

A wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what such consequences are is to be determined by the jury.

Plaintiff's carriage was broken by the accident and he was obliged to procure another and was thereby exposed to the cold and rain. *Held*, That defendant was liable for the injuries sustained, even though they were solely due to his exposure, provided

he was free from negligence in the exposure; that the exposure was the direct and proximate result of the accident.  
Reversing S. C., 18 W. Dig., 292.

This action was brought to recover damages for injuries sustained by plaintiff in consequence of a defect in a street in the city of New York. The street in which the defect existed was on the northerly side of the Harlem river, in the district annexed to the city of New York by Chapter 613, Laws of 1873, as amended by Chapter 329, Laws of 1874. Under said act the territory mentioned was annexed to, merged in and made a part of the city and county of New York, subject to the same laws and entitled to the same rights as if it had always been included within said city and county when its charter was first granted and had always remained so. § 1. The Mayor and Common Council of the city were invested with the same powers over this territory as if it had always been a part of the city. § 11. The Commissioners of Public Parks were given exclusive power to locate, lay out, construct and maintain all public parks, streets, roads and avenues, and to devise plans for, and to locate all bridges and tunnels, and have the exclusive control of the maintenance and construction of all public parks within said territory and to construct and maintain all bridges, tunnels, sewers, streets, roads and avenues so laid out. § 14.

*De Lancey Nicoll*, for applt.

*D. J. Dean*, for resp't.

*Held*, That the city was bound to keep its streets in a safe condi-

tion for use in the mode usual to travelers, 3 Hill, 612; 16 N. Y., 158; 45 id., 129; 91 U. S., 340; 9 N. Y., 163; 37 id., 567; 74 id., 264; that the exclusive control given by the Act of 1873 (Chap. 613 as amended) over the territory annexed thereby to the Park Commissioners is not exclusive of the city, but exclusive of any other officers of the city, and in the discharge of any corporate duty resting upon the municipality they represent it and it may be chargeable with their misfeasance and nonfeasance. The Park Commissioners are not independent public officers, but a part of the machinery for carrying on the municipal government. 3 Hill, 538; 2 Den., 433; 91 U. S., 540; 16 J. & S., 16.

*Maximilian v. Mayor, &c.*, 62 N. Y., 160; *Ham v. Mayor, &c.*, 70 N. Y., 459; *N. Y. & B. S. M. & L. Co. v. City of Brooklyn*, 71 N. Y., 580, distinguished.

Plaintiff was employed as a salesman or canvasser for a publishing house under a contract by which he received for his services a certain percentage on his sales in New York city, Brooklyn, Long Island, Staten Island and Westchester county. He was permitted to prove, under objection, that his earnings for six or seven years prior to the accident were from \$4,000 to \$7,000 a year.

*Held*. No error. 41 Barb., 381; 63 id., 260; 19 Hun, 366; 37 N. Y., 287; 53 id., 612; 20 How., U. S., 43; 2 Black, 590; L. R. 4 Q. B., 406.

*Masterson v. Village of Mount*

Vernon, 58 N. Y., 371, distinguished.

Plaintiff gave evidence tending to show that he had a disease of the spine of a permanent nature as the result of his injuries. This was objected to on the ground that no such result was alleged in the complaint. It did allege that plaintiff had suffered great bodily injury, that he became and still continues sick, sore and disabled, and had been obliged to spend large sums in attempting to cure himself; that he was prevented for a long time from attending to his business and was otherwise injured.

*Held*, That the allegations of the complaint were sufficient to authorize proof of any bodily injury resulting from the accident.

The judge was requested to charge the jury that defendant was liable "only for such damages as might reasonably be supposed to have been in the contemplation of plaintiff and defendant as the probable result of the accident." This request was refused.

*Held*, No error. A wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what are such consequences must generally be left for the determination of the jury. 94 U. S., 469.

It appeared that the accident occurred in the night while it was raining; that plaintiff drove into an excavation in the street, his horses jumped, the axle of his carriage broke and he was dragged partly over the dashboard. Men who came to his help assisted him

to take the horses from the carriage, and he procured another carriage and harnessed his horses to it and drove several miles to his home. To do this and report the accident to the police station near by consumed several hours, during which plaintiff was exposed to the cold and rain and his clothes were wet through. He did not know that night he had sustained any injury, but felt the pain in his back the next morning. Plaintiff gave evidence tending to show that his injuries were the result of the strain and shock caused by his being dragged over the dashboard, and defendant gave evidence tending to show that they were the result of the subsequent exposure to the cold and rain. The court left it to the jury to determine whether the injuries complained of, were the proximate, direct result of the accident, and among other things charged that defendant was liable to plaintiff even if the disease from which he suffered were solely due to his exposure, provided he was free from fault and negligence in the exposure.

*Held*, No error; that the exposure was the direct and proximate result of the accident. 28 N. Y., 217; 4 Abb. Ct. Apps. Dec., 521.

When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would

not have been sustained but for such defect. When several proximate causes contribute to an accident and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but cannot be attributed to a cause unless without its operation the accident would not have happened. 77 N. Y., 83.

Order of General Term, reversing judgment for plaintiff and granting new trial, reversed, and judgment on verdict affirmed.

Opinion by *Earl, J.* All concur.

#### JURORS. ARSON. EVIDENCE.

#### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Hooghkirk, impled., *applt.*

Decided June 3, 1884.

The right of a defendant to challenge the body of the grand jury because irregularly or defectively constituted no longer exists; he can raise no objection except to individual jurors under § 239, Code Crim. Pro.

On a trial for arson in the third degree two accomplices swore that defendant was to and did purchase cheap horses to be exchanged for more valuable ones before the fire. Several witnesses testified to selling cheap horses to defendant and one S. swore to the exchange of horses being made. The court refused to charge that there was no evidence to corroborate the accomplices. *Held*, No error.

Evidence of the defendant on cross-examination in such cases with reference to his connection with other fires and with insurance on other property burned is admissible in the discretion of the court as affecting his credibility.

The defendant was indicted for arson in the third degree at the Sessions of Albany County, in September, 1883, by a grand jury selected in pursuance of Chapter 532, Laws of 1881. Before the jury was sworn or impaneled, defendant, who prior to the commencement of the term had been committed to answer to any indictment that might be found against him thereat, filed in open court a written protest or objection under oath against the swearing, organization or recognition by the court of the persons summoned as grand jurors or of any of them as a grand jury, on the ground that they were not drawn or summoned as required by law. The objection was overruled.

*E. Countryman*, for applt.

*D. Cady Herrick*, District-Attorney, for *respts.*

*Held*, No error; that the objection interposed was in the nature of a challenge to the array. The right of a defendant to challenge the body of the grand jury because irregularly or defectively constituted no longer exists, and there is no provision of law which permits a defendant to raise any objection to the grand jury, except an objection to individual jurors under section 239 of the Code of Criminal Procedure.

Two of the witnesses for the prosecution, J. and N., were by their own concession accomplices of defendant in the commission of the crime charged in the indictment. The facts testified to by them were substantially as follows: On and prior to January 2,

1883, J. was lessee of a stable, and the horses and property therein he had had insured for \$500, which at defendant's suggestion was increased to \$1,000 with the understanding that N. was to set fire to the building, for which he was to receive \$100, and that the insurance money should be divided between J. and defendant. The latter was to buy some cheap horses to be put in the stable in place of more valuable ones to be removed before the fire. The fire occurred Tuesday, January 2, 1883, at 12.50 A. M. On Monday or Sunday evening before the fire N. swore that defendant brought two cheap horses to a point near the stable, and then exchanged them for two other horses belonging to defendant, which N. and one S., by the direction of J., had taken from the stable, and that the horses received from defendant were taken back to the stable and burned in the fire. One or two other cheap horses were, as the accomplices testify, purchased by defendant shortly before the fire and placed in the stable. N. admitted that he set fire to the stable. Several witnesses testified that they had sold horses to defendant for \$10 and \$15 apiece just before the fire. S. testified to the exchange of the horses sworn to by N.; that upon his asking J., for whom he was then working, what he was doing, he told him he would give him \$50 if he would keep still. The court refused to charge that there was no evidence tending to corroborate the testimony of the witnesses J. and N.

*Held*, No error.

Defendant was cross-examined with reference to his connection with other fires and with insurance on other property burned.

*Held*, No error; that such evidence was admissible in the discretion of the court as affecting his credibility. 72 N. Y., 393; 94 id., 137; 19 W. Dig., 7.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Andrews, J.* All concur.

#### EMINENT DOMAIN. DAMAGES.

N. Y. COURT OF APPEALS.

Whitney et al., *applts.*, v. The State, *respt.*

Decided June 10, 1884.

Plaintiffs' land was taken by the State for a canal, the benefits conferred on the owners being estimated by the appraisers to exceed the damages sustained. Subsequently the State released said lands to the City of B., and authorized it to use the same as a public street. This was done, plaintiffs being compelled to pay large assessments and their remaining property being damaged by the improvement. *Held*, That plaintiffs were concluded by the appraisal made and that the State was not liable for damages alleged to have been sustained by reason of the abandonment of the canal; that its release to the city was only of such title or interest as the State had in the premises.

The appellants presented to the Court of Claims a demand for damages, claiming as assignees or heirs at law to be the owners in fee and to hold title to a lot of land in the City of Binghamton, which was taken by the State, up-

on appraisal duly made, for a portion of the Chenango Canal. The land in question was at that time owned by S. & A., in connection with other lands upon which there had been a hotel which was destroyed by fire and which was then being re-built with a canal frontage. The damages were appraised at \$2,500, but it was determined that the benefits conferred on the owners of the property by the construction of the canal exceeded the damages sustained by the appropriation of the land, and no damages over and above said benefits were appraised to the owners of the land. The State entered upon and took possession of the land and constructed and operated the canal until June 4, 1878, when by Act of the Legislature the State released to the City of Binghamton the premises, together with the remainder of that portion of the Chenango Canal lying within the limits of the city, and authorized the city to take possession and use the same for a public street. Plaintiffs alleged that the premises in question are now worth \$19,200, and claim that the State is liable either to return and surrender said premises to them, or pay them the market value of the same. Plaintiffs also alleged that the city proceeded to lay out a street, fill in, grade and otherwise change the relative status of the canal surface so as to completely destroy the basement of the hotel, and impose large assessments and onerous charges and burdens upon the claimants as owners of the residue

of the premises. The Court of Claims dismissed the complaint as against the State on the ground that the papers filed did not constitute a valid claim against the state and refused to take testimony in regard thereto.

*William Eldredge*, for applts.

*D. O'Brien*, Attorney-Genl., for resp't.

*Held*, No error; that the State could not be made liable for the damages alleged to have been sustained by reason of the abandonment of the canal. The act of the appraisers in fixing the amount of damages sustained by the owners of the land was an adjudication as to all damages arising from the taking of the land, and was conclusive against the parties interested in the same. By the taking of the land and the appraisal of damages the State made no guaranty or covenant that the canal would be used for any period of time or that it should never be abandoned. The benefits and advantages intended by the statute to be taken into account by the canal appraisers were not those derived from a direct use of the canal, but referred to the indirect advantages to the owner of the adjacent property growing out of the rise in value, &c., occasioned by its construction. 65 N. Y., 69. Chapter 391, Laws of 1878, was merely a release by the State of such title or interest as it had in the premises; it seems, therefore, that the claimants may seek relief by ejectment or otherwise against the proper parties.

Order of Court of Claims, dismissing claim, affirmed.

Opinion by *Miller, J.* All concur.

## ANTENUPTIAL AGREEMENT. WILLS.

### N. Y. COURT OF APPEALS.

Beardsley et al., assignees,  
*respts. v. Hotchkiss et al., applts.*

Decided June 3, 1884.

By an antenuptial agreement made prior to the married women's acts the wife's real estate was conveyed to a trustee with reservation of a right to the wife to devise the same to her husband or her issue in such shares as she deemed proper. She executed a will referring to said contract. She and her husband received the rents etc. of the property, giving receipts therefor to the trustee. *Held*, That it was competent under the agreement for the trustee to allow them to use, occupy and enjoy the property; that the receipts given, the reference to the contract in the will and the execution thereof were acts sufficient to show a ratification of the contract, and that the husband's creditors could not set up the wife's infancy for their own benefit; that the will conveyed only the property embraced in the contract.

The will devised all the wife's property to her children and provided that if any died under twenty-one without leaving issue the share of the one so dying should go to the survivors. *Held*, That there was no illegal suspension of alienation.

One of the children died under age without issue. *Held*, That the unexpended income of his share passed to his father as his next of kin.

The children were supported, maintained and educated by the father during their minority and resided with him after they came of age. *Held*, That they were not chargeable with the sums expended for their support, education and maintenance.

In 1844 one L., being the owner of certain real and personal estate

and about to marry H., entered into an antenuptial agreement with him, by which she conveyed and transferred to one W. all her real estate, in trust, to receive the rents, issues and profits and apply the same to her sole and separate use. The marriage took place May 1, 1844. Five children were born. The antenuptial contract provided that L., notwithstanding her coverture, might give and devise all her property covered thereby to her husband or her issue, or any one or more of such issue, in such shares and proportions as she should deem meet. L. died in July, 1855, having the January previous executed a will which, after reciting the antenuptial contract by its date and place of record, and that she had therein reserved the right and privilege of giving and devising her real and personal estate therein described and referred to, she disposed of her property as follows, viz :

"Now therefore, I, the said Lucretia Hotchkiss, do make, publish and declare this my last will and testament in manner and form following, that is to say, First, I give, devise and bequeath unto such child or children as I shall leave or have living at the time of my decease, and to their heirs and assigns forever, all my real and personal estate of every name and nature and wheresoever situated, and more particularly described in the instrument herein above referred to, provided nevertheless that in case either or any of my children living at my decease shall die before he, she or they shall arrive



at the age of twenty-one years, and without issue living at the decease of such child or children, the share or estate of the child or children so dying shall vest in and belong to, and I give and devise the same to, the survivors or survivor of such deceased child or children; and if such remainder cannot take effect it shall not defeat or destroy the estate given and intended to be given to my said children. And I hereby commit the guardianship of all my children, until they shall respectively obtain the age of twenty-one years, unto the said Leman B. Hotchkiss, my said husband, and give him the power to use, occupy and control as such guardian, for the use and benefit of my said children, all my real and personal estate devised and bequeathed to my children as aforesaid."

She nominated her husband executor of her will. W., the trustee, died in 1856. A son died in 1861, aged thirteen. The trustee never exercised any control over the property mentioned in the antenuptial contract, but during the life of L. it was occupied, controlled and used by her and her husband, and she annually gave the trustee a receipt in full for the amount she was entitled to under the antenuptial contract. After her death her husband, acting as executor, took possession of the property disposed of by the will and occupied portions of the real estate himself at times, rented portions of it to other persons, used the personal property and the avails of the real estate in his own busi-

ness, and in all respects managed and controlled the property at his discretion until June 7, 1879, when being insolvent he made a general assignment to plaintiffs for the benefit of his creditors, preferring his three younger children, the defendants W., F. and A., for the amounts justly due them on account of moneys and property of his wife, their mother, which he had received, as such amount should be found after applying all just payments and offsets thereto on a just and fair settlement, and he put the four Bank defendants, from whom shortly before his assignment he had borrowed \$55,000, into the fourth and last class of his creditors. The assignees paid about all the debts, except those due the children and the banks, and then brought this action to determine the amounts due the children. The latter claimed to recover for the use and occupation of the property by their father, after the death of their mother. It appeared that at the time the antenuptial agreement was executed L. was a minor, and the Banks defendant claimed that it was disaffirmed and avoided by her and her husband after she reached her majority, and therefore the husband's marital rights attached to the property.

*William F. Cogswell*, for Hotchkiss et al.

*A. P. Rose and Peter B. Olney*, for the Banks.

*Held*, Untenable; that it was consistent with the contract that the trustee should permit the husband and wife to use, occupy and

enjoy the property, and the annual receipts executed by L. and the reference to the contract in her will and the execution of the will in pursuance thereof were all unequivocal acts of recognition of the contract and sufficient in law to show a ratification of it. The defense of infancy is for the benefit and protection of infants, and other persons cannot set it up for their own benefit. 17 Wend., 419; 18 Barb., 320; 25 id., 399; 33 N.Y., 526, 536, 543; 43 id., 23; 49 id., 407; 83 id., 245.

The referee held that the will of L. operated not only upon all the property embraced in the antenuptial contract, but also upon all the property owned by her at her decease.

*Held*, Error; that the will was intended only as an execution of the power of disposition reserved in the contract. 1 Sim., 286; 5 East, 51; 5 Sim., 525; 5 Taunt., 321; 8 T. R., 579; 60 N. Y., 183.

*Also held*, That upon the death of any child without living issue, the share of such child in the personal property was given absolutely by the will to the survivors and vested absolutely in them, free from any other contingencies. As to the real estate the limitation over created a contingent future estate in expectancy, which was descendible, devisable and alienable the same as an estate in possession, 1 R.S., 725, § 35; 19 N. Y., 384; 41 id., 66; 44 id., 1; 84 id., 257; 92 id., 539, 549, and there was no illegal suspension of the power of alienation in reference thereto.

*Manice v. Manice*, 43 N. Y., 303, distinguished.

The antenuptial contract recognizes an agreement on the part of L.'s husband that her personal estate should be settled and assessed to her sole and separate use during her life, with power on her part to dispose of it by will, and then contains covenants on his part that he "will from time to time, and at all times hereafter, join and concur with his intended wife in all such acts" &c. necessary for effectually settling, assigning and assuring all such personal estate as she "now is the owner of, or which by reason of the premises before stated she is or may be entitled unto the trustee subject to the power hereinbefore mentioned and intended to be reserved to the said Lucretia." Among the powers reserved was one to dispose of the property by will. The personal estate was not granted or conveyed.

*Held*, That by force of the agreement and covenants of the husband, founded upon the consideration of marriage, the title to the personal estate remained in the wife free from the marital rights and control of her husband and at her death passed to her children under her will. The agreements and covenants of the husband and of the marriage settlement amount to a release of his marital rights in and to the personal property of his wife which a court of equity will enforce. 3 Johns. Ch., 523; 12 N. Y., 415, 422.

*Also held*, That the unexpended accumulated income of the share

of the child that died in 1861 passed to his father as his next of kin.

*Also held*, That the conditional limitation over contained in the will of L. was authorized by the provisions of the antenuptial contract. 2 Sugden on Powers, 294.

It appeared that the father maintained, educated and supported his children during their minority, having sufficient means to do so. His creditors now seek to make a charge against the children for such expenditures. The Court refused to allow the claim.

*Held*, No error. 2 Myl. & K., 439; 2 Barb. Ch., 375; L. R., 7 Ch. D., 754; 6 Eng. L. & Eq., 71; 6 Johns., 566; L. R., 8 Ch. App., 415.

It also appeared that the children resided with their father after they became of age. The Court refused to credit the father with their ordinary support and maintenance.

*Held*, No error. 3 N. Y., 312; 15 Hun, 134; 48 Barb., 327.

The father was charged with interest, at the legal rate, on all sums for which he was held liable, without annual rests.

*Held*, No error.

Judgment of General Term, modifying judgment on report of referee, reversed, and judgment on report of referee affirmed.

Opinion by *Earl, J.* All concur.

#### EXAMINATION BEFORE TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Davenport Glucose Co.,

*respt.*, v. Isaac Taussig et al.  
*appls.*

Decided May 9, 1884.

An order for the examination of a defendant before trial in an action to recover possession of goods sold to defendants, the sale and possession of which are alleged to have been fraudulently obtained by defendants, will not be refused upon the ground of defendant's privilege when the object of the examination is to ascertain the quantity of goods that came into defendant's hands, the time when they received the same, the time of making the sale and delivery of the same by them to another party, and the quantity delivered to him, &c.

The fact that questions may be put on such an examination which the defendant may be privileged from answering is not a reason for holding that he cannot be examined at all.

Appeal from an order denying a motion to set aside an order for the examination of the defendants before trial.

This was an action to recover possession of personal property sold to defendants, which sale was alleged to have been procured by fraud on the part of defendants, who were insolvent at the time and did not intend to pay for the goods and who subsequently made a general assignment. An order for the examination of the defendants before trial was obtained upon affidavits stating the object of the examination to be to prove when the defendants received the goods, when they learned of their insolvency, to whom and on what dates they transferred the goods, the consideration of such transfer, and to ascertain other facts that would be necessary and material for the plaintiff in the prosecution of the

action. The defendants moved to vacate this order upon the ground that the object was to procure testimony to establish the alleged fraud and that the defendants were privileged from being examined for that purpose.

*W. C. Hippenheimer*, for appls.

*A. P. Whitehead*, for resp't.

*Held*, That while the authorities on the question of the right to examine the parties in an action where the plaintiff's cause of action is for fraud are somewhat in conflict, there is no case which holds that, in an action to recover possession of personal property alleged to have been procured by fraud, the quantity of goods that came into defendants' hands, the time when they received the same, the time of making the sale or transfer of the same to another party and the quantity delivered to him, &c., are not proper subjects for a preliminary examination.

That the fact that some questions may be put upon an examination before trial which a defendant may be privileged from answering does not seem to be a good reason for holding that he cannot be examined at all in an action of this kind.

That on such an examination it would be for the judge to determine, as it would on a trial, whether the questions are such as the defendant is not bound to answer.

Order affirmed.

Opinion by *Davis, P. J.*; *Daniels* and *Haight, JJ.*, concur in the result.

Vol. 19—No. 14b.

## CONSTITUTIONAL LAW.

### N. Y. COURT OF APPEALS.

*In re* petition of the U. S. for the appointment of commissioners.

Decided June 3, 1884.

The acts of 1876 and 1879, granting to the U. S. the right to acquire the right of way necessary for the improvement of the Harlem River, &c., are not unconstitutional.

The Federal Government may lay aside its sovereignty and enter the state courts as a petitioner and procure the condemnation of land for its public use through proceedings authorized by the state legislature.

On Oct. 8, 1879, the United States petitioned the Supreme Court to be allowed to acquire certain described lands necessary for the construction and use of a proposed improvement of the Harlem River and Spuyten Duyvil creek. The petition contained the allegations required by the statute in relation thereto, entitled "An act granting to the United States the right to acquire the right of way necessary for the improvement of the Harlem River and Spuyten Duyvil creek, and for the construction of another channel from the North river to the East river, through the Harlem Kills, and ceding jurisdiction over the same." Laws of 1876, Chap. 147, as amended by Laws 1879, Chap. 345. Persons whose land is affected by the proceedings appeal from order appointing commissioners and allege that the acts of 1876 and 1879 are unconstitutional and void, because,

1st. "The right of eminent domain cannot be exercised by one sovereignty for the uses of an-

other," and therefore "the state cannot condemn lands for the use of the general government."

2d. Because they are designed to take private property without making just compensation.

3d. Because the title of the act offends, article 3, section 16 of the constitution, which provides that no local or private bills shall contain more than one subject, and requires that subject to be embraced in the title.

*Franklin Bartlett and John M. Masten*, for applts.

*Samuel E. Lyon, Fordham Morris, D. G. Crosby and Arthur Berry*, for respts.

*Held*, 1st. That while the federal government as an independent sovereignty has the power of condemning land within the state for its own public use, Cooley's Const. Law (5th ed.), 525; 91 U. S., 367, it may lay aside its sovereignty and as a petitioner enter the state courts and there accomplish the same end through proceedings authorized by the state legislature. 39 N. Y., 171; 18 Cal., 229; 106 Mass., 356; 7 Barb., 24.

*Also held*, That the use for which the land is sought is a public one.

*Darlington v. U. S.*, 82 Penn., 382; *Trombly v. Humphrey*, 23 Mich., 481, distinguished.

Second, Just compensation need not in all cases be given concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of

such property may compel payment of his damages. 18 Wend., 9; 26 id., 485; 6 Hill, 359; 11 N. Y., 308. This means reasonable legal certainty. 54 N. Y., 146; 89 id., 189.

The act of 1876 did not provide how the money to pay for the lands condemned is to be raised. By the act of 1879 (§ 5) the commissioners are directed not only to ascertain the compensation to be made, but also "the amount to be assessed upon the real estate benefited by the improvements," and "establish the area of real estate upon which the amount necessary to pay the awards and expenses of such proceedings shall be assessed by them." Section 6 of the act of 1879 so amends section 5 of the act of 1876 as to provide for the collection of the assessment and payment of the awards to those entitled thereto, and a report to the court for such action as to it shall seem meet, and only after these things are done can the United States take possession of the property or the owners be divested of their rights. By Chapter 167, Laws of 1880, as amended by Chapter 6, Laws of 1881, the act of 1876 was amended and the comptroller of the city of New York was authorized to raise of the assessment bonds of the city \$50,000, or so much as might be necessary to make up any deficiency in collection of the sums assessed under the statutes relating to the improvement, and from the proceeds of the collections and these bonds pay all sums which had been awarded to persons in-

interested in lands taken for it. By further amendment, Chap. 214, Laws of 1883, the comptroller was authorized to raise on assessment bonds not exceeding \$200,000 and apply it in payment for the land taken.

*Held*, That the acts make sufficient provision for compensating for the lands taken.

Third, The title of the act of 1876 fully expressed the subject of the act and was sufficient to meet the requirements of the constitution. 19 N. Y., 117; 50 id., 504; 69 id., 557; 86 id., 437.

Order of General Term, affirming order of Special Term denying motion to vacate orders appointing commissioners, affirmed.

Opinion by *Danforth, J.* All concur.

### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Constance B. Price, *respt.*, v. Walter J. Price et al., *appls.*

Decided May 9, 1884.

In an action brought against the executors of a deceased person to recover the proceeds of certain bonds alleged to have been deposited with such deceased person in his lifetime for the benefit of plaintiff, the plaintiff is prohibited by § 829 of the Code of Civ. Pro. from testifying in her own behalf to facts showing the delivery by her of such bonds to the said deceased person. Under said section the plaintiff in such an action is precluded from testifying in her own behalf to a conversation taking place in her presence between the deceased and a third person and especially if she participated in any part of such conversation

Appeal from a judgment entered on the report of a referee.

This action was brought against the executors of W. W. Price, who was plaintiff's husband, to recover part of the proceeds of \$11,500 of United States bonds, the property of the plaintiff, which the plaintiff alleged were received from her by said Price in his lifetime for safe-keeping and which he afterwards converted into money and kept the proceeds in his hands for her benefit. On the trial the plaintiff was called as a witness on her own behalf and was allowed to testify that on the 25th of March, 1865, she discovered that five \$100 bonds owned by her had been stolen from her trunk, but that \$11,500 worth of bonds owned by her were still there; that defendant's testator came to her room after the discovery of the theft; that he subsequently came again with a detective, and that during a conversation between himself and the detective in which the plaintiff took a slight part, but did not participate in generally, he produced the \$11,500 worth of bonds of plaintiff from his pocket and exhibited them to the detective and stated to him that the thief would not get any more of them as he was going to put them into a bank for plaintiff. The defendants excepted to the admission of this testimony, claiming that it should have been excluded under § 829 of the Code of Civ. Pro.

*Hughes & Northrup*, for *appls.*  
*J. L. Hill*, for *respt.*

*Held*, Error: that the plaintiff

was allowed to testify to a matter of substantial fact concerning a personal transaction between herself and the deceased, because the several facts just stated taken together show that her bonds remaining in the trunk on that morning had in some manner been transferred to the possession of the deceased, and this testimony in connection with her claim that they were delivered to him for safe-keeping for her benefit went far toward establishing the allegations of her complaint.

That the evidence should also have been excluded on the ground that it concerned a personal communication between the plaintiff and deceased. That the said section does not refer only to a communication which is personal between the witness and the deceased in the sense of having been directly addressed or spoken by the latter to the former and that the cases which so hold have no sound principle to stand upon. A personal communication within the true meaning of the section is any one which the surviving party claims to have received directly or indirectly from the deceased person and which the deceased person if living could contradict or explain, and the mode of making the communication by the deceased to the survivor is not at all controlling.

That, moreover, it appeared that the plaintiff participated in some part of the conversation had in her presence between the deceased and the detective, and under some of the authorities this was sufficient to exclude the testimony.

Judgment reversed.

Opinion by *Davis, P. J.*; *Daniels, J.*, concurs in the result.

## EQUITY. FORECLOSURE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Emigrant Industrial Savings Bank, *respl.*, v. Isabella D. Clute, impleaded, *applt.*

Decided May 9, 1884.

In a mere action of foreclosure a title acquired prior to the execution of the mortgage can neither be contested nor defeated. A mortgagee whose mortgage is the last of a series of mortgages, the proceeds of each of which was applied to the paying off and taking up of the mortgage immediately preceding it, is entitled to have the original mortgage revived and enforced in his favor for the purpose of extinguishing the title acquired by a purchaser at an execution sale under an execution issued upon a judgment recovered against the owner of the property subsequent to the making of the first mortgage, but previous to the making of the last, when the said mortgages were given in ignorance of the existence of such judgment owing to the fact that the docket of it omitted an initial letter of the judgment debtor's name.

The purchase of the property under the execution and the application of the purchase price upon the judgment, without paying it otherwise, does not vest such purchaser with the rights of a bona fide purchaser of a title so as to defeat an equity of the above description. The right so acquired would not in any event extend beyond the amount of money so paid.

Appeal from a judgment recovered on trial at the Special Term.

This was an action to foreclose a mortgage. The mortgage sought to be foreclosed was the last of a series of mortgages upon the same property, the proceeds of each of

which were used in paying off the preceding mortgage which was then delivered to the new mortgagee. Subsequent to the giving of the first mortgage a judgment was recovered against the owner of the property, and, previous to the giving of the mortgage sought to be foreclosed in this action, the property in question was sold under an execution issued thereon to the defendant, Clute. The purchaser, however, did not enter into possession of the property, and the mortgages given subsequent to the docketing of the said judgment were given in ignorance of its existence, owing to the fact that one of the judgment debtor's initials were omitted in the docket.

Upon the trial of the action, the defendant Clute moved that the complaint be dismissed as to her for the reason that the question of the priority of the plaintiff's right to collect its mortgage debt over her right as a purchaser under the execution could not be tried in this action. This motion was denied, and judgment of foreclosure and sale rendered in favor of plaintiff.

*Thos. J. Clute*, for applt.

*Bartholomew Skaats*, for respt.

*Held*, That in a mere action of foreclosure a title acquired prior to the execution of the mortgage can neither be contested nor defeated. 6 Paige, 635; 75 N. Y., 127.

But that the facts as they were presented in the complaint presented a cause of action in equity to which the defendant Clute was a necessary party for the revival

and enforcement in plaintiff's behalf of the original mortgage, and that said relief was not demanded in the complaint was no legal impediment in the way of awarding it in this action. § 1207, Code of Civ. Pro.

That although the mortgage itself had been in form extinguished, this was done in ignorance of the fact that the judgment had ever been recovered and docketed as a charge upon the property, and the object, as shown by the facts and the surrender of the original mortgage to the new mortgagee, was not to extinguish the lien of the debt upon the property, but to change the right to it from one mortgagee to another, and to secure to the lender of the money the same right as was vested in the original mortgagee by the mortgage to him. That these rights vested primarily in the respective owners of the property who paid the various mortgages with the money borrowed for that purpose, and, if the action had been brought by one of them, there could have been no doubt that the original mortgage could be revived in his favor. That that right was an incident of the title, and when that title was mortgaged to secure the loan made for its preservation, the parties to whom the mortgages were respectively given necessarily acquired the same right. 64 N. Y., 397; 66 id., 363; 82 id., 155; 93 id., 225; 26 Hun, 10.

*Kitchell v. Mudget*, 37 Mich., 81, and *Wade v. Baldwin*, 40 Mo., 486, not followed.



That the purchase of the property under the execution and the application of the purchase price upon the judgment, without paying it otherwise, did not vest the defendant Clute with the rights of a bona fide purchaser of the title so as to defeat an equity of the above description. 70 N. Y., 553.

Wood v. Chapin, 3 Kernan, 509, distinguished.

That the right so acquired could not extend beyond the amount of money so paid, 63 Barb., 215; 49 N. Y., 286, and in no view could she wholly defeat the right of the plaintiff and his mortgagor to the equity mentioned.

That since the judgment provided only for the foreclosure and sale of the last mortgage, and not for the revival, &c. of the first, it should be reversed and a new trial ordered.

Ordered accordingly.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

### CREDITORS' ACTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles Lichtenberg, *applt.*, v. Elizabeth Herdtfelder et al., *respts.*

Decided May 9, 1884.

When a mortgage made by a deceased person in his lifetime has been foreclosed and a judgment of deficiency entered against his executors, the mortgagee cannot maintain an action against grantees of such deceased person to set aside the conveyances to them as fraudulent without the previous issuance of an execution on his deficiency judgment against said executors, although such exec-

utors have no property of the estate in their hands out of which such execution could be satisfied.

Appeal from a judgment of the Special Term dismissing the plaintiff's complaint.

George Herdtfelder and wife, in the lifetime of the former, executed a mortgage to the plaintiff upon land owned by Herdtfelder to secure his bond. After Herdtfelder's death the plaintiff foreclosed this mortgage and a judgment of deficiency was entered in the action against Herdtfelder's executors. There was no property of the estate in the hands of such executors out of which this judgment could be satisfied, and, without issuing an execution thereon, plaintiff brought this action against the defendants as grantees of Herdtfelder to set aside the conveyances made to them as fraudulent.

*F. R. Coudert*, for applt.

*Isaac Kugelman*, for respts.

*Held*, That the action could not be maintained. That if an action of this kind is brought under § 1871 of the Code of Civ. Pro., execution must not only be issued but it must be returned in whole or in part unsatisfied, while if it is brought under the general equitable power of the court to remove illegal obstructions caused by fraudulent incumbrances or disposition of the debtor's property out of the way of the execution it must at least be issued before an action is commenced. 32 N. Y., 53; 23 Hun, 49; 88 N. Y., 503; 87 N. Y., 585; 18 W. Dig., 326; 18

W. Dig., 409 ; 7 Hun, 208 ; 32 N. Y., 457.

That the fact that the debtor himself may be deceased forms no legal excuse for the omission to issue the execution. His executors or administrators in that case stand in his place and represent him. 88 N. Y., 434 ; 67 N. Y., 264 ; 53 N. Y., 622.

That *Loomis v. Tift*, 16 Barb., 541, must be considered as overruled.

Judgment affirmed.

Opinion by *Daniels, J.*; *Haight, J.*, concurs; *Davis, P. J.*, dissents upon the ground that the issuing and return of an execution would be an absolutely useless and idle ceremony, and it is a maxim of law and equity that it will not demand a vain thing.

### EXECUTORS.

#### N. Y. SUPERIOR COURT. GENERAL TERM.

*Eliza A. Thomas, exrx., respt., v. The N. Y. Life Insurance Co., applt.*

Decided April 7, 1884.

An executor holds from the will itself, and the law, by a subsequent probate of it and qualification of the executor, has secured two principal objects, viz., proof in the only form the law can recognize, and that there will be no renunciation of the obligation of administration; and notwithstanding 2 R. S., 71, § 16, providing that no executor, before letters, "shall have any power to dispose of any part of the estate, except, etc., a sale by a person named in a will as executor, of assets of the estate, before probate, for full value and for the benefit of the estate, is valida-

ted by the subsequent qualification of the same person as executor.

Where a sale so made is not one which would be a rightful act of administration, and is not made valid by relation, in an action for conversion of the goods brought by the executor after probate and letters, the true rule of damages requires that the amount of money formerly paid into and remaining with the estate should be applied to reduce the amount of the recovery, viz. the true value of the goods.

Appeal by defendant from judgment entered upon finding and conclusion of a judge, he trying the issues by consent.

The action was for damages for the conversion by defendant of goods and chattels, part of the testator's estate. The act of conversion, as alleged, was the defendant's buying and receiving from the plaintiff, before she had taken out letters testamentary, the goods and chattels in question, she selling and delivering them to the defendant. The goods and chattels in question were the office furniture of deceased and the defendant paid full value therefor, viz. \$400, but he knew at the time of such purchase that plaintiff was not then executrix. The money so received by plaintiff was not used for funeral expenses or for preserving the estate. Judgment was rendered for plaintiff for the value of the property, \$400. It was contended the sale was contrary to 2 R. S., 71, § 16.

*Held*, That an executor holds from the will itself, as if he were an agent or attorney of the testator, and that the law by a subsequent probate of the will and qualification as executor has secured two principal objects, viz., proof in the

only form the law can recognize, and that there will be no opportunity of a renunciation of the obligations of administration, therefore the application of the doctrine of relation seems to be reasonable. Apparently, the cases are authority that a sale like the present is validated by the subsequent qualifying as executrix. 16 Wend., 579; 7 Hill, 181; 2 Hill, 225; 8 Johns., 126; 21 Barb., 314; 10 Paige, 549.

*Further held*, That assuming the sale to have been against § 16, and not made valid by relation, the damages must be nominal.

The transaction was such as would have been a rightful act of administration, and appeared to be for the benefit of the assets of the estate. It must be intended that the money remained in the estate.

The true rule of damages, the executrix not claiming the goods themselves, would require that the amount of money formerly paid into and remaining with the estate should be applied to reduce the amount of the recovery, which was the whole value of the goods.

Amount of recovery reduced to six cents.

Opinion by *Sedgwick, Ch. J.*; *Freedman* and *O'Gorman, JJ.*, concur.

#### PARTNERSHIP.

N. Y. SUPERIOR COURT. GENERAL TERM.

Washington Manley, *applt.*, v. William Taylor, *respt.*

Decided Jan. 18, 1884.

The general rule is that in a copartnership where one partner gives time, labor and skill and no money, and the other gives only money, each contribution is set against the other, and if there be a failure each loss is to be borne by the loser exclusively without right to contribution.

The rule will be the same though the member contributing money has but one-fourth interest in the business and the other three-fourths.

Appeal from judgment entered on report of referee.

Plaintiff and defendant went into business together, plaintiff furnishing money "as a special deposit, but to be used in the business;" he to be a silent partner, and to take no active part in the business, and to have an interest of one-fourth therein; the defendant to be the active partner, giving his time and personal attention to the business and doing all that was necessary to make it successful, and to have a three-quarter interest therein. At the time of the dissolution plaintiff's special deposit amounted to \$1,326. The business was not successful, and the losses exhausted the available assets, including a considerable share of plaintiff's "special deposit."

The question in the case was whether the defendant can be called on to make good the deficiency in proportion to his three-fourths interest in the business.

The referee held that the plaintiff was entitled to take the assets, and after paying the claims of the creditors of the firm to apply the remainder to the payment of the balance due and unpaid on his special capital account, and if any surplus remained, that it was to

be divided between him and the defendant in the proportion of one-fourth to the plaintiff and three-fourths to the defendant; and the referee did not allow the claim of the plaintiff against the defendant for contribution, in order to make up the deficiency which appeared on account of plaintiff's special deposit.

*Stickney & Shepard*, for applt.

*John A. Balestier* and *T. Darlington*, for respt.

*Held*, That the conclusion of the referee was correct. When one member of a partnership puts money into the business, but gives to it no time or attention, and expends upon it no skill or labor, while the other partner contributes no money, but does contribute his time, attention, labor and skill to make the business productive, his contribution of labor, etc., is to be set against the money contribution of the other; and in case of failure, his loss of labor, etc., is to be set against the money loss of the other, and each loss is to be borne exclusively by the loser without any right to contribution from the other. 3 Bos., 105. This rule is not inflexible, and each case must be decided according to its own circumstances, and the intention of the parties to be deduced therefrom; and these were questions which it was within the province of the referee to determine.

Judgment affirmed, with costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, and *Freedman, J.*, concur.

## SAVINGS BANKS. CONSIDERATION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Rome Savings Bank, *respt.*,  
v. Henry Kramer et al., *appls.*

Decided April, 1884.

A bank incorporated under Chap. 324, Laws of 1851, is authorized to make loans from its available fund upon personal securities. A plea of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish a legal wrong. Surrender of a cause of action for money loaned is good consideration for a promissory note.

Appeal from judgment at circuit, and from order denying motion for new trial.

Action on joint and several promissory note for \$3,500, executed by Kramer and others and given upon surrender by plaintiff of two other notes held by it as security for money loaned by plaintiff for the benefit of a church of which the makers were members, and upon which two other notes was then due the sum for which the note in suit was given. The note was the only security for the debt. Plaintiff was incorporated by virtue of Chapter 324, Laws of 1851. The defense is that the note was taken in violation of plaintiff's charter and of the general laws prohibiting unauthorized banking, and is therefore illegal and void.

*W. Kernan*, for appls.

*Henry A. Foster*, for respt.

*Held*, That § 6 of the act authorizes the trustees of plaintiff to make loans from the "available

fund" upon personal securities. And the trustees might, in their discretion, keep a sum not exceeding one-third of the total amount of deposits as a fund to meet current payments, although it exceeded \$25,000. The note was not discounted, in the sense of that term as used in banking operations. 17 N. Y., 507, 515; Laws of 1847, Ch. 478, § 1; Laws of 1865, Ch. 214, § 1; Laws of 1854, Ch. 72, § 1; Laws of 1865, Ch. 150; 59 How. Pr., 303; 4 Assembly Doc., 1879, p. 52; id., 44; Laws of 1849, Ch. 241; Laws of 1857, Ch. 136, § 1; *Skaneateles Sav. Bk. v. Vary*, 4 Dept., 1874, unreported.

The loan was not *ultra vires*. But if it were, yet, as the corporation has fully executed its part of the contract, defendants cannot set up the want of power to shield themselves from a just liability. 63 N. Y., 63.

Again, even if the original notes were *ultra vires* and void, the bank had a good cause of action against the makers of them for the money loaned. 79 N. Y., 437; id., 449. The surrender and extinguishment of that cause of action was a good consideration for the note in suit, and this view of the case avoids the defense set up.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### MECHANICS' LIENS. VERIFICATION.

N. Y. SUPERIOR COURT. GENERAL TERM.

Christopher B. Keogh et al.,

*respts.*, v. Stephen A. Main, *applt.*, and Thomas Mulry et al., *respts.*

Decided March 3, 1884.

As the mechanics' lien law of 1875, applicable to New York city, was not repealed by the general law of 1880, a verification under the latter law that the statements therein contained are true to the best of his knowledge, information and belief is insufficient in a case arising in said city.

Under the statute of 1875 a verification that "the same is true to the best of his own knowledge" is insufficient and confers no lien.

Appeal by defendant Main from judgment in favor of plaintiff and defendants Mulry, foreclosing certain mechanics' liens on property of the defendant Main, in the city of New York.

The court ordered that the premises in question be sold, and directed that from the proceeds, after paying the costs, the referee pay to plaintiff the amount of a mechanics' lien; and second, to pay to the defendants Mulry the amount of a mechanics' lien filed by them.

Plaintiff's lien was filed and verified under Chapter 486 of the Laws of 1880, and was not verified in accordance with the provisions of Chapter 379 of the Laws of 1875. Section 5 of that act requires that the claim be verified by the oath of himself, or of one of several united in interest, or of some other person. The verification must be to the effect that the statements contained in the claim are true to the knowledge of the person making the same. The verification to the plaintiff's lien was "that the statements therein contained are true to the best of his (depo-

ment's) knowledge, information and belief."

*Jones, Roosevelt & Carley*, for applts.

*R. P. Harlan* and *E. D. Barlow*, for plffs. respts.

*W. P. Mulry*, for respts. Mulry.

*Held*, That the verification was clearly insufficient under the statute of 1875, and as there was no claim filed and verified as required by the statute of 1875, plaintiff could have no lien on the premises under that statute. 8 Daly, 166; 3 E. D. S., 662. In *McKenna v. Edmondstone*, 91 N. Y., 231, the Court of Appeals held that the mechanics' lien law of 1875 was not repealed by Chapter 486 of the Laws of 1880, but that the act of 1875 was in force in the city of New York; and in *Childs v. Bostwick*, 62 How. Pr., 146, the General Term of the Court of Common Pleas held a lien verified as in this case was insufficient and failed to give a valid lien.

*Further held*, That the verification of the claim filed by the defendants Mulry was also defective. The statute requires that the verification should be true to the knowledge of the person making the same. The verification was that "the same is true to the best of his own knowledge." It may be true to the best of the knowledge of the person verifying the claim, and at the same time such person have no actual knowledge of any of the facts stated in the claim.

Judgment reversed; new trial ordered, costs to abide event.

Opinion by *Ingraham, J.*; *Sedgwick, Ch. J.*, concurs.

## INSPECTION OF WRITINGS.

N. Y. SUPERIOR COURT. GENERAL TERM.

*Elizabeth M. Meliesy, applt. v. Hippolyte Kahn et al., respts.*

Decided March 21, 1884.

Where in an application for an order to examine defendants' books to ascertain the names of persons to whom defendants had sold certain merchandise in contravention of their agreement to sell only to plaintiff, in order to enable plaintiff to frame complaint, the petition alleges that defendants did so sell to other persons, *Held*, That the application should not be granted; that the knowledge or information which enabled plaintiff to make this distinct and definite statement was enough to enable plaintiff to frame her complaint.

Appeal from order of Special Term, denying petition of plaintiff for inspection and copy of entries in account books of defendant in order to ascertain the names of the persons to whom defendant had sold "hare bellies," in violation of their agreement with plaintiff, and in order to enable plaintiff to frame her complaint.

The plaintiff states in her verified petition that defendants did sell largely to other persons, and offered her the refuse after such sale of the best material.

*Simpson & Werner*, for applt.

*Benno Loewy*, for respt.

*Held*, That if plaintiff is possessed of knowledge or information sufficient to enable her to make this distinct and definite statement under oath, there can be no difficulty

in framing a complaint calling for a definite verified answer to that allegation.

The power to search through defendants' account books in order to find isolated entries, not particularized, to enable plaintiff to frame a complaint, is open to great abuse and should only be granted where the purpose and necessity of such examination are apparent. At a later stage of the proceedings, when the issues between plaintiff and defendants shall have been developed, other appropriate measures can be taken by plaintiff to obtain the information now sought, if it be found to be then necessary.

Order affirmed, with ten dollars costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, and *Freedman, J.*, concur.

#### DEED. DESCRIPTION.

N. Y. SUPERIOR COURT. GENERAL TERM.

Walter H. Mead, as trustee,  
v. John Riley.

Decided Jan. 18, 1884.

Where premises adjacent to a road were conveyed by the owner of the fee by the following description; "Beginning at the corner formed by the intersection of the easterly line" of the road "with the northerly line" of another street, and terminating "thence along the easterly line" of said road to the place of beginning, etc., *Held*, That the land conveyed was not bounded by the centre of the road, but by its side, and that a different intention does not appear from the fact that the deed also designates the property by numbers upon a certain map which repre-

sents the property as abutting upon the road.

Submission under Code Civ. Pro., §1279. In 1860, Broadway, between Ninety-first and Ninety-second streets, otherwise known as the Bloomingdale road, was a public highway, and the trustees of Herman Thorn, deceased, then sold and conveyed to Gilbert Colgate land "beginning at the corner formed by the intersection of the easterly line of Broadway with the northerly line of Ninety-first street one hundred and sixty-two (162) feet and four (4) inches, to the Tenth avenue; thence northwardly along the westerly line of the Tenth avenue two hundred and one (201) feet and five (5) inches to Ninety-second street; thence westwardly along the southerly line of Ninety-second street one hundred and forty-two (142) feet and three (3) inches to Broadway; thence southwardly along the easterly line of Broadway two hundred and two (202) feet five (5) inches to the point or place of beginning, be the said dimensions more or less." The trustees, grantors, were then seized of the land adjacent, forming the said highway. Through various "mesne" conveyances, containing the same description, the fee in the land so described has become vested in John Riley, the defendant.

By the deed of 1860, from the trustees to Gilbert, a plot containing sixteen lots of land was conveyed by metes and bounds as set forth on a certain map of land filed in the register's office. On this map the width and depth of

each of said lots by feet and inches, is set forth and the lines therein described include the whole space covered by said lots, and do not include any part of the highway as it then existed.

The question to be determined was, whether by such description the fee in one-half of the highway passed to the grantee of said trustees subject to the public easement, or whether it remained in the grantor.

*Anderson & Howland*, for plttf.

*A. B. Johnson*, for deft.

*Held*, That the deed of 1860, from the trustees under the will of Herman Thorn, did not convey from the grantor to the grantee therein an estate in fee in any part of the road, being the premises in controversy. 87 N. Y., 287.

The point of commencement of the description is important, as for instance, when it began at the intersection of the exterior of two streets, the Court held that the point thus established was as controlling as any monument could be, and that all *lines* of the granted premises must conform to the starting point. 64 N. Y., 65; 5 Daly, 385; 4 Robt., 35; 60 N. Y., 609; 6 Gray, 36.

In this description it is clear from the commencement of these lines that the word *line* is equivalent to the word *side*, and the lines cannot possibly enclose land lying to the westward of the easterly side of the Bloomingdale road.

The map referred to in the description of the deed may be consulted in aid of the court in arriv-

ing at a conclusion, and the boundaries as set forth in the map may be examined, and they do not include any part of the Bloomingdale road.

Judgment for plaintiff, declaring him the owner in fee of said premises, and that he recover possession thereof, with costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, and *Freedman, J.*, concur.

## INSPECTION OF WRITINGS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Oscar E. Rafferty, *respt.*, v. James H. Williams et al., *appls.*

Decided Feb. 4, 1884.

Where the petition for an inspection of writings before issue joined contains enough matter to enable plaintiff to frame his complaint, the application should not be granted, though it may appear that certain of the allegations must be made on information and belief.

Appeal by defendant from an order granting to plaintiff an inspection of documents and agreements to enable him to draw his complaint.

The petition showed that the action was by a creditor to set aside an assignment made by his judgment debtor to the defendant Williams, and to compel Williams to account for the property that had been assigned to him. It further alleged that such assignment was made with intent to defraud the plaintiff, and gives the particulars of the facts that would sufficiently show, if proven, that



the assignment was fraudulent on the part of Williams.

*Eugene Smith*, for appls.

*Beltz & Lange*, for respt.

*Held*, That the order appealed from should be reversed. It can be sustained only if the petition showed that the inspection was necessary to enable plaintiff to draw his complaint. But in this case it contains enough matter, without the aid of an inspection, to enable plaintiff to frame properly a sufficient complaint; therefore the inspection was not necessary.

It is not necessary that the allegations should be made upon knowledge; they may be made upon information and belief.

Order reversed, with \$10 costs and disbursements to be taxed. Motion for inspection denied, without costs.

Opinion by *Sedgwick, Ch. J.*; *Truax* and *O'Gorman, JJ.*, concur.

### ALIMONY. DIVORCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Elizabeth Brennan. *respt.*, v. Owen Brennan, *applt.*

Decided May 9, 1884.

Where all the facts upon which plaintiff's right of action for a limited divorce is based are denied and the preponderance seems to be in favor of defendant, the husband, the court should not award alimony pendente lite without at least sending the matter to a referee to determine as to the disputed facts, but the granting of counsel fee is proper, it satisfactorily appearing that plaintiff is without means to prosecute her action.

Appeal from order of Special Term granting alimony and allowance for counsel fee. This action was brought by plaintiff for a limited divorce, based upon an alleged abandonment and acts of cruelty charged against defendant. These charges were explicitly denied and the denial fortified by the affidavits of several persons.

*J. McCrone*, for applt.

*R. Busted*, for respt.

*Held*, In such a case of conflict, and especially where the preponderance seems to be with the defendant, alimony ought not to be allowed. The case should have been sent to a referee for the purpose of determining what the real facts were before making such an order. We think upon the papers before us that the portion of the order relating to alimony was improperly granted.

So far as respects the counsel fee there seems to be no dispute that plaintiff is poor and unable to pay the expenses of prosecuting her action. She has a right, therefore, to the assistance of the court in compelling defendant to furnish means to enable her to employ and compensate counsel and it does not matter that there would seem to be a preponderating case against her upon the merits of the action, because whether that is so or not is the very issue she was entitled to try, and the court should not refuse to give her the necessary means to enable her to try the same. The order should be modified by striking out of the provisions of the order the allow-

ance of alimony and without prejudice to any further application therefor on the part of plaintiff.

Opinion by *Davis, P. J.*; *Brady, J.*, concurs.

EXAMINATION BEFORE  
TRIAL. ACTION FOR  
LEGACY. FOREIGN AD-  
MINISTRATOR.

N. Y. SUPERIOR COURT. GENERAL  
TERM.

Jonas Fischer, *applt.*, v. Max  
Fischer, *respt.*

Decided Feb. 4, 1884.

An action at law will not lie to recover a distributive share of an intestate's estate, though a promise to pay has been made, unless it can be shown that the administrator holds the property individually on a new contract of loan to him. In all other cases the relief is in equity.

Where the complaint in such an action alleged defendant's appointment in another State as administrator, and the collection by him therein of certain moneys of the estate, and that defendant is a resident here and has such moneys, in the absence of a more specific allegation the moneys will be deemed to be in the foreign jurisdiction, and an order for defendant's examination will be vacated on the ground of lack of jurisdiction over the subject matter.

Appeal by plaintiff from order vacating an order for the examination of defendant before trial.

The complaint stated that the plaintiff was one of the kin of Elizabeth Fisher, always resident of and who died in Hungary; that the defendant obtained in the State of Georgia, from a court competent in such matters, under proper circumstances, letters of adminis-

tration upon the estate of Fischer, and thereupon collected from a debtor of Fischer, residing in Georgia, \$1,000 due to her; that defendant is a resident of the State of New York and has possession of said \$1,000; "that no part was needed to pay debts of the deceased or any funeral or other necessary expenses of her, and that the defendant has paid no such debts or expenses with said \$1,000, or upon the credit thereof, and has no claim upon or offset to the same by reason of having paid any such debts or expenses or for any other like cause, and he has fully administered upon the estate of said deceased, Elizabeth Fischer, under said letters of administration; and that there remains in his hands as such administrator over \$1,000 of the estate of said deceased Elizabeth Fischer, to be distributed among the next of kin." The complaint demands that defendant be adjudged to account for the said moneys, and to pay over to this plaintiff his distributive share "or other share" of the same with interest.

*D. S. Riddle*, for *applt.*

*Blumensteil & Hirsch*, for *respt.*

*Held*, That if it appeared that the court had not jurisdiction of the subject matter of the action, then it was competent to vacate the order of examination, although that might be doubtful if the objection were that the complaint did not state facts sufficient to constitute a cause of action of which the court would have jurisdiction when properly stated.

An action at law is not sustainable for a distributive share of an intestate's property, although the personal representative has promised payment, unless there be evidence showing that he holds the money, not as executor or administrator, but in his individual character, upon a new contract of a loan of it to him. 1 Chitty Pl., 101.

The remedy is the resort to a court of equity to compel the administrator to perform his duty in respect of the property of which he holds the legal title for the benefit of such persons as are by the law interested in it. Accordingly, the courts of this State having no jurisdiction over administration by foreign executors or administrators in general, will have no jurisdiction in particular, unless it is established that there is within this State a fund or property. 6 Barb., 429.

It is consistent with the complaint that the money is not in fact within this State. The presumption is that the property to be administered is within the jurisdiction of administration.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Sedgwick, Ch. J.*; *O'Gorman, J.*, concurs.

#### ASSESSMENTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re Fernando Wood, et al.*

Decided May 9, 1884.

Payment of an assessment for local improvements in the city of New York before petition filed to vacate it is a good defense to the application to vacate.

After a joint petition by 37 property owners to vacate assessments on separate lots of land owned in severalty by them for constructing an outlet sewer in 66th street in New York city, and after a delay of over ten years after filing such petition without taking any proceedings thereon and after the assessment levied had been paid an application was made to sever the petition originally filed into separate petitions of the property owners and such leave to sever the joint petition was granted. *Held*, Reversing the order below, that it is doubtful whether the court has such power, but if it has it should not have been exercised in this case after such great laches and the practical abandonment of the original petition, especially as granting the application enables the petitioners to place themselves by reason of their negligence owing to new rulings of the courts in a position far better than they enjoyed before.

Appeal from an order of the Special Term, granting an application on behalf of certain property owners to sever their joint petition to vacate assessments on certain lots of land owned in severalty by them for constructing an outlet sewer in 66th street and several other branches thereof in other streets in New York city, for reasons assigned in the petition. The petition was filed December, 1873. No further step was taken on said petition till September, 1880, when an amended petition was served upon which no action has ever been taken. It appears in the affidavits that when the joint petition was filed it was done with the authority and consent of the corporation counsel who then tolerated that course of practice, and an assistant then in the office says that the sys-

tem continued in vogue until he left the office of the corporation counsel on the first of July, 1874. It appears also that subsequent to the service of the petition the assessments on the lots of the several petitioners were paid, and the affidavit of the attorney for the petitioners states that it has been lately decided by the Court of Appeals, in the case of the Metropolitan Gas Light Company that the said assessment is illegal to the extent of 20 7-10 per cent., and that it has also been lately decided that a petitioner may, notwithstanding the fact of payment pending the proceeding to vacate, have an order vacating or adducing his assessment.

*Albert L. Cole*, for applt.

*P. A. Hargous*, for respt.

*Held*, It is manifest upon the face of the papers that this proceeding, which was commenced 10 years before this motion was made, was intended to be abandoned by the petitioners; that they came in and paid the assessments and took no proceedings to bring their petition to a trial and hearing. When payment was made of the assessments it was supposed to be the law that such payment ended proceedings to vacate, and the court so held until the recent decision of the court of last resort above referred to. Now after so great a lapse of time and after the two decisions which changed the views of the law doubtless entertained at the time the payment of the assessments was made it is too late to permit the petitioners

to sever their petition, which new proceedings are to be treated as though filed and served of the date of the original proceeding. No one objects to the petitioners proceeding on the original petition to establish such rights as they may have under that, and if the power exists to permit the severance of the original petition we think it was improvidently exercised after such great laches, inasmuch as the effect of this order is simply to create a device by which parties who have been grossly negligent can, by reason of their very negligence, be placed in a position far better than they enjoyed before. It is enough that they may be allowed to go on and enjoy whatever rights they have under their pending petition without allowing the commencement of 37 separate petitions, subjecting the city to costs and expenses of 37 new litigations under cover of a single old one, for the purpose of keeping out defences which may have grown up out of their own delay.

The order should be reversed, with \$10 costs and disbursements, and the motion denied.

Opinion by *Davis, P. J.*; *Daniels, J.*, concurs, saying, I am satisfied that the direction given is correct. If each petitioner should now present a petition for his own individual case it would not be an amendment of the original, but a new proceeding. And payment before its presentation would be a complete answer on the part of the city. I agree, therefore, to the disposition suggested on this

ground and those stated in the opinion. *Brady, J.*, concurs.

### CONTEMPT

N. Y. SUPERIOR COURT. GENERAL TERM.

Rachel Mahon, *respt.*, v. Terence P. Mahon, *applt.*

Decided Feb. 4, 1884.

Defendant in an action for limited divorce was ordered on his default to pay alimony and counsel fee pending the action, and on his stipulating to pay costs and disbursements the matter was reopened and sent to a referee to take proof of defendant's ability to pay, etc. Plaintiff succeeding, defendant was ordered to pay the fees of referee and stenographer, and on his neglect so to do, the issuance of a precept was ordered directing his detention until payment, etc. *Held*, On appeal from order for precept, that it was properly served on the attorney who had appeared for defendant in the action; that the payment of the fees being a condition of a favor the defendant should pay them on notification of the amount and an order directing payment can be entered without formal demand. And that an order for a precept must adjudicate in terms that the accused has committed the offense charged, and that it was calculated to or did defeat, impair, etc., the right or remedies of plaintiff.

Appeal from an order of Special Term, directing defendant to pay the sum of \$160, and from an order directing that a precept issue to the sheriff of the city and county of New York, commanding him to take the body of defendant.

Action to obtain a limited divorce. Respondent procured an order by default, granting her \$12 a week alimony, *pendente lite*, and \$100 counsel fee. Subse-

quently, and on December 11, 1882, as a favor to appellant, default was opened, and the matter referred to a referee, to take proof of appellant's financial ability to pay alimony and counsel fee; the appellant to stipulate to pay the costs and expenses of the reference, which stipulation appellant gave. Subsequently, on April 12, 1883, in continuing the reference before another referee, expenses of the reference were ordered to be paid by appellant. The referee reported in respondent's favor. The referee's fees amounted to \$80, and the stenographer's fees to same amount. A motion was thereupon made to compel the appellant to pay said fees, which was granted, and appellant having failed to comply with said order, a motion was made to punish him as for a contempt. Thereafter, and on August 16, 1883, it was ordered that a precept issue, directing that defendant be detained in the common jail until the payment of said fees. The order to show cause upon which this order was granted was not served on defendant personally, but on his attorneys, and the order (August 16, 1883), while it recited specifically the grounds of the motion, viz.: defendant's non-payment of said fees, did not in terms adjudicate that he had been guilty thereof.

*Culver & Wright*, for *applt.*

*Brewster Kissam*, for *respt.*

*Held*, That as there is no determination or adjudication in this order, directing that a precept issue, that the accused has commit-

ted the offense charged, and that that offense was calculated to or did actually defeat, impair or prejudice the rights or remedies of the plaintiff as required by §§ 2281, 2283, Code Civ. Proc., this order should therefore be reversed.

*Further held,* That where a party has appeared in an action by attorney it is not necessary to serve him with the order to show cause why he should not be punished as for a contempt; such an order is correctly served if served on the party's attorney. 37 N.Y., 235.

Order affirmed, without costs.

Opinion by *Truax, J.*; *O'Gorman, J.*, concurs.

### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James Thompson, *applt.* v. The N. Y. C. & H. R. RR. Co., *respt.*

Decided May 9, 1884.

Plaintiff's driver with team approached defendant's railroad crossing, his horses walking, where the view up and down the track was obstructed, as plaintiff's driver well knew, and the driver, when about 100 feet from the track, looked both ways up the track as far as he could see and hearing nothing proceeded and again when about 60 feet from the track looked one way up the track and as he was about to look the other way his attention was drawn to a boy who was approaching him in the middle of the road and his attention continued to be directed toward the boy until, when about three feet from the track, the driver heard the whistle of the defendant's approaching train about 40 feet distant too late to back the horses from the track. The plaintiff's driver could have seen the train if he had

looked when some distance farther from the track than at the time when he heard the whistle. The horses were killed and wagon and harness destroyed. *Held,* That the driver was guilty of contributory negligence and plaintiff could not recover. That the driver's attention was directed to the boy to prevent his injury by the team, when it should have been given to the train. He thus abandoned necessary care and caution at a time when it was important that he should have given his direct and exclusive attention to a danger which was commanding if not imminent.

Appeal from a judgment entered upon the dismissal of plaintiff's complaint at the close of plaintiff's case, and from an order granting an additional allowance to defendant of five per cent.

Action to recover damages for the destruction of a team of horses and the truck to which they were attached, through the negligence of defendant. The accident took place at Tremont in the county of New York and upon a railroad track operated by defendant. The following facts appeared at the trial. Plaintiff's driver with his team approached the crossing, the horses jogging along just off from a walk. The view up and down the track just before reaching the crossing was obstructed by intervening objects, as plaintiff's driver well knew, and the driver when about 100 feet from the crossing and approaching it looked up and down the track as far as he could see, and hearing nothing, proceeded, and when about 60 feet from the crossing again looked one way and when about to look the other way, from which dereliction the train was approaching, his attention was

attracted by a boy coming toward him at some little distance and the driver proceeded until, when about three feet from the track, he heard the whistle and saw the approaching train about 40 feet distant, too late to back his horses as he attempted to do. The train could have been seen if the driver had looked when some little distance farther away from the track, than he was at the time when he heard the whistle and saw the train. There was no flagman at the station, and the driver well knew of the obstruction to the view and the danger attending the crossing the track at that place.

*Nelson J. Waterbury*, for applt.

*Frank Loomis*, for respt.

*Held*, That the law required on the part of the driver approaching the track a vigilant use of the eyes in looking, and of the ears in listening, to ascertain whether there was a train approaching, and the omission of such vigilance causing an injury which might have been avoided by such vigilance is such negligence as will bar a recovery therefor, although the Railroad Company may have been guilty of negligence contributing to the damage. 47 N. Y. 400. This vigilance does not require that a person approaching a crossing in a vehicle with a team should leave his team and go to the track for the purpose of looking or to rise up in his vehicle and go upon the track in a standing position to enable him to obtain a better view of the track, but such person approaching a train in a vehicle owes the duty of being

careful and this duty he is not relieved from because it is not train time, as railroad crossings near villages are liable to be used at any time, without regard to the regular period when trains are due. The application of the principles enunciated in 75 N. Y., 273, and 67 N. Y., 587, require we think an affirmance of the judgment. The proof shows that the driver's attention was directed to the boy to prevent his injury by the team when it should have been given to the train. He thus abandoned the elements of proper care and caution at a time when it was important that he should have given his direct and exclusive attention to a danger which was commanding, if not imminent. The absence of a flagman at the crossing does not aid the plaintiff, inasmuch as it does not establish the liability of defendant. 60 N. Y., 133.

Judgment affirmed, with costs.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

#### PLEADING. CONVERSION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Saffold Berney et al., respls., v. Anthony J. Drexel et al., applts.*

Decided May 9, 1884.

In an action for the conversion of certain personal property belonging to a testator, an averment in the complaint that "under and by virtue of the laws of France, where the testator had his domicil, the title to all the personal property of which said testator was possessed at the time of his decease vested immediately thereafter in the plain-

tiffs, the residuary legatees named in said will, their title being subject, however, to the payment of the particular legacies by said will bequeathed and of the annuities therein given," is sufficient to entitle the plaintiff to prove the laws of France, and is sufficient, as an allegation of title, to maintain the action.

An allegation in a complaint in an action of conversion that the defendant "converted" the property in question to his own use is an allegation of fact and is sufficient to admit of any evidence on the trial of issue joined that tends to establish such conversion, and plaintiff is not bound to allege the particular act or acts which constitute the conversion complained of.

Appeal from a judgment entered on overruling a demurrer to the complaint.

The plaintiffs, who were the widow and the residuary legatees of Robert Berney, deceased, brought this action for conversion of certain personal property belonging to said Berney. At the time of his death said Berney's domicil was the City of Paris, and it was alleged in the complaint that "under and by virtue of the laws of France, the title to all the personal property of which said testator was possessed at the time of his decease vested immediately thereafter in those of the plaintiffs who were the residuary legatees named in the will, their title being subject, however, to the payment of the particular legacies by said will bequeathed, and of the annuities therein given." One of the questions raised by the demurrer was, whether this was a sufficient allegation of title to enable the plaintiffs to maintain the action. It was claimed by defendants that this was an allega-

tion of a legal proposition or conclusion, and not of a fact.

*Tracy, Olmsted & Tracy*, for appls.

*Lord, Day & Lord*, for respts.

*Held*, That the said allegation was one of fact, under which, at the trial of the issue, the plaintiffs would be at liberty to prove the laws of France for the purpose of establishing the fact that the title to the personal property vested immediately upon the decease of the testator in them, and on that fact being so proved the legal result would be that such title would draw to it the right of possession and show full authority to maintain the action.

The complaint proceeded then to allege facts showing that one James Berney had fraudulently obtained possession of the property in question by virtue of letters testamentary, procured in the court of another State having no jurisdiction, and that, having such fraudulent possession, through his attorneys, had sold and transferred the property to defendants; and that by the will and codicil, and the several powers of attorneys, the said defendants had legal notice of the invalid title to said property acquired by them; and it further alleged that the defendants had converted the said property to their own use. It was claimed by the defendants that this was also an allegation of a conclusion of law.

*Held*, That the averment of notice probably presented a question of law, but that it was not necessary to determine its effect, for the



subsequent allegation that the defendants converted the property to their own use was one of fact, and would admit, upon the trial, of evidence that the defendants not only received the property in the manner stated in the complaint, but that they subsequently disposed of them under such circumstances as would uphold the action against them, or to admit proof of a demand and refusal to deliver the property, or any other fact showing a conversion.

That where conversion is alleged as a fact in general terms, that is sufficient to admit of any evidence on the trial of the issue joined that tends to establish such conversion; and the plaintiff is not bound to allege the particular act or acts which constitute such conversion.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Daniels* and *Haight, JJ.*, concur.

#### FOREIGN EXECUTOR. WAIVER.

N. Y. SUPERIOR COURT. GENERAL TERM.

Robert Gray, *applt.*, v. Mary E. Ryle, *exrx.*, *respt.*

Decided March 3, 1884.

Where there is neither allegation nor proof in an action against a foreign executor that defendant has brought into the state assets of the estate, the court is without jurisdiction, and this concerns the power of the court and not the person of the defendant, and therefore is not waived by appearance and answer on the merits.

Appeal from judgment dismissing complaint at Special Term.

Action to recover from the defendant, in her representative capacity, a certain sum alleged to have been due to the plaintiff from William Ryle in his lifetime by virtue of a contract made between said Ryle and plaintiff. The defendant was charged in the complaint in her capacity as executrix of said Ryle's estate by appointment of the surrogate of Passaic County, New Jersey. The complaint contained no allegation as to the existence of assets of the estate in this state. The defendant did not demur, but appeared and answered on the merits. At the opening of the trial the counsel for the defendant moved to dismiss the complaint for lack of jurisdiction in the court to adjudicate anything herein against the defendant --the complaint showing that defendant's representative capacity arises solely by virtue of her appointment as executrix by a foreign court under a foreign probate. The motion was granted.

*Christopher Fine*, for *applt.*

*Preston Stevenson*, for *respt.*

*Held*, That the complaint was properly dismissed. This was an action against a foreign executrix. The plaintiff did not allege nor was there proof that the defendant had brought into this state assets of the estate. This court was without jurisdiction to enforce any liability of the defendant as executrix, and this concerned the power of the court and not the person of the defendant.

Judgment affirmed, with costs.

Opinion *per curiam*; present, *Sedgwick, Ch. J.*, and *Truax, J.*

PRACTICE. MOTION FOR  
NEW TRIAL.N.Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.Adam Emmerick, *respt.*, v. Peter  
Heffernan, *applt.*

Decided May 9, 1884.

When the complaint in an action is dismissed upon defendant's motion, before any evidence is taken in the case, upon the ground that it does not state facts constituting a cause of action, the Court has jurisdiction to entertain and determine a motion made by the plaintiff at the same term, upon his exception to such dismissal and upon the Judge's minutes, to vacate and set aside the order dismissing the complaint and for a new trial, and is not precluded from so doing by § 999 of the Code of Civ. Pro.

Section 999 of the Code of Civ. Pro. is not exclusive, and does not deprive the courts of the authority to order new trials, invested in them, which has not been derived from or made dependent upon the Code, and within that authority courts have the power to correct or set aside their judgments inadvertently made or given, particularly when the correction may be made during the same term.

Appeal from an order granting a new trial.

This action was brought on for trial at Circuit, and before any evidence was given in the case counsel for the defendant Heffernan, moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action as to him. This motion was granted and plaintiff excepted. Subsequently and at the same circuit plaintiff made a motion on the exception to vacate and set aside the order dismissing the complaint and for a new trial. On the argument the defendant consented to the mak-

ing of the motion on the minutes of the justice by whom the action was tried, waiving all questions as to the irregularity thereof and the right of plaintiff to make the motion. The motion was granted by the justice and an order made vacating and setting aside the order dismissing the complaint and ordering a new trial. It was insisted on appeal that this order was without jurisdiction, upon the ground that § 999 of the Code of Civ. Pro. is the only authority for the granting of a new trial upon the minutes of the judge, and that section only applies where a verdict is rendered.

*A. R. Dyett*, for *applt.*

*W. G. McCrea*, for *respt.*

*Held*, That this procedure was not obnoxious to § 999 of the Code of Civ. Pro. That it was neither more nor less than a case where a judge at circuit, having dismissed a complaint on the ground that it did not state facts sufficient to constitute a cause of action, allows the question to be reopened for further argument and consideration by him, the parties consenting and waiving all objections of irregularity and jurisdiction, and the result was, legally speaking, precisely the same as though he had denied the original motion to dismiss.

That § 999 of the Code of Civ. Pro. is by no means exclusive and has not deprived the courts of the authority vested in them, which has not been derived from or made dependent on the provisions of the Code, and within that authority courts have power to correct or set

aside their orders or judgments inadvertently made or given, particularly when the correction may be made during the same term, 8 Hun, 362, 366-7; 5 Abb. N. C., 157, 166; 75 N. Y., 609, and this power was all that was exercised in making the order appealed from.

Order affirmed.

Opinions by *Davis, P. J.*, and *Daniels, J.*

#### ASSIGNMENT FOR CREDITORS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Edward M. Burghard, receiver, *applt.*, v. Philip R. Sondheim et al., *respts.*

Decided Feb. 4, 1884.

Where, in case of an assignment for benefit of creditors, the assignment purported to be of all the property contained in schedule B to pay the debts contained in schedule A and set forth that the schedules were attached, and such schedules were neither attached nor recorded, *Held*, That the assignment being complete and conveying all the debtor's property without them, they were not a necessary part of it and the assignment was sufficient under the statute.

Appeal from a judgment of the Special Term in favor of the defendants. The action was brought to set aside an assignment for the benefit of creditors. The assignment was of all the property contained in schedule B, and was made to pay the debts mentioned in schedule A. The assignment referred to these schedules as annexed to it, but, as matter of fact, they were not so annexed and were

not recorded in the office of the county clerk with the assignment. It is on this ground that the plaintiff seeks to set aside the assignment.

*Charles H. Smith*, for applt.

*Melvin & Steckler*, for respts.

*Held*, That neither of the schedules was a necessary part of the assignment. That instrument was complete without them. It conveyed all of the assignee's property in trust to pay all his debts. That was all that the statute required.

Judgment affirmed, with costs.

Opinion *per curiam*; *Sedgwick, Ch. J.*, and *Truax, J.*, sitting.

#### GUARDIAN AD LITEM.

N. Y. SUPERIOR COURT. GENERAL TERM.

*In re Michael Mang.*

Decided Feb. 4, 1884.

The court will not appoint as special guardian the father of an infant desirous of bringing an action, where it appears that the father is not of sufficient means to fulfil the requirements of Code Civ. Pro., § 469, and Rule 49, though it appears that such infant has no other friend or relative of greater means to take such position.

Appeal from order of Special Term, denying the application of the petitioner to be appointed special guardian of his daughter, on the ground that the petition does not show the applicant to be a responsible person within the meaning of the Code of Civil Procedure, § 469, and of the 49th general rule.

It is set forth in the petition

that Louisa Mang, an infant, was driven over by the team and wagon of which the Schaefer Brewing Company are the owners, and severely injured thereby; that the petitioner is her father and desires to be appointed her guardian *ad litem*, to bring suit on her behalf against said company; that he is forty-three years old, has a wife and five children to support, and earns two dollars a day in the employment of one Fischer, a manufacturer of pianos. That neither he nor his child Louisa has any relatives or friends of greater means than himself who would assume the position of guardian *ad litem*.

*R. V. W. DuBois*, for petitioner.

*Held*, That the guardian *ad litem* should not have been appointed unless the papers on which the application was made showed his pecuniary responsibility. 2 Abb. N. C., 434; Code of Civ. Pro., § 469; Genl. Rule, 49.

It may work a hardship in this particular instance. But the uncertainty of the law is one of the most dangerous of the defects which can be charged against it, and when rules cease to be binding they cease to be rules.

Order affirmed, without costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, concurs.

### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Bridget Coyle, admrx., *respt.*,  
v. The L. I. RR. Co., *applt.*

Vol. 19—No. 15b.

Decided May 9, 1884.

In an action to recover damages occasioned by the death of plaintiff's intestate through the alleged negligence of defendant while plaintiff's intestate was crossing the defendant's railroad track, *Held*, It is error for the court to leave it to the jury as a question of fact to determine whether defendant should have maintained a flagman at the crossing, and whether defendant was guilty of negligence because no gate had been erected at this crossing.

Appeal from a judgment on a verdict of a jury and from an order denying motion for a new trial upon the minutes.

Action to recover damages sustained by the death of Patrick Coyle, which it was alleged was caused solely by the negligence of defendant. Upon the trial several exceptions were taken and among others, exception was taken to the court's refusal to charge as requested, "That defendant is not bound, either in law or in fact, to maintain a flagman at this crossing; also "that the jury cannot hold defendant liable because no gate had been erected at this crossing." The court left it for the jury to determine whether or not defendant was negligent in omitting to maintain a flagman at this crossing and also whether it was not guilty of negligence because no gate had been erected at this crossing, against objection and exception.

*E. B. Hinsdale*, for applt.

*Dennis McMahon*, for respt.

*Held*, Error; that the court improperly left it to the jury as a question of fact to determine whether defendant was bound

to maintain a flagman at this crossing and also whether the defendant was guilty of negligence because no gate had been erected at this crossing. 92 N. Y., 219; 40 N. Y., 9; 40 N. Y., 46; 63 N. Y., 522.

Judgment reversed, new trial ordered, with costs to abide the event.

Opinion by *Brady, J.; Davis, P. J.*, and *Daniels, J.*, concur.

### EJECTMENT. WRIT OF POSSESSION.

N. Y. SUPERIOR COURT. GENERAL TERM.

David C. Carleton, *applt.*, v. The Mayor, &c. of N. Y. *impld.*, *respt.*

Decided March 3, 1884.

The plaintiff in whose favor judgment in ejectment was rendered went into possession of the premises, and said judgment was affirmed by the General Term. Afterwards the Court of Appeals reversed the judgment and ordered the complaint to be dismissed, and such judgment was made the judgment of this court, but no provision was made therein for restitution. *Held*, that it was within the general power of the Special Term to issue a writ of possession.

Appeal from an order of the Special Term directing the issuance of a writ of possession.

A verdict was rendered herein in favor of plaintiff establishing plaintiff's title to a certain lot of land in the city of New York, subject to the opinion of this court at General Term. Afterwards, the General Term ordered judgment in favor of plaintiff for the recovery of the said lot and for costs. The Mayor, etc., of New York appealed therefrom, and the Court of

Appeals reversed said judgment, and ordered that plaintiff's complaint be dismissed with costs, and the judgment of the Court of Appeals was made the judgment of this court.

The plaintiff argues that on the judgment of this court, as it now stands, there is no authority for such an order, because the judgment as entered does not in terms provide for the issuing of a writ of possession.

*A. B. Philbrook* and *Erastus Cooke*, for *applt.*

*George Andrews* and *T. B. Clarkson*, for *respt.*

*Held*, That the only claim which plaintiff can set up to the right of possession of the lot in question depends on the above judgment in his favor, and the judgment of the general term affirming the same. But these judgments were reversed by the Court of Appeals, and thereupon ceased to have any force or vitality. The case stood as if they had never existed. If it had been in terms provided in the judgment of the Court of Appeals that the defendants, the Mayor, etc., should recover possession of the lot, and that a writ of possession should issue against the plaintiff therefor, no question as to the propriety of that step by this court could well have arisen. But, notwithstanding the absence of these words in the judgment, the power to issue the writ of possession is a consequence of the judgment, and existed in the special term, in order to carry out the necessary logical effect of the judgment and render it effectual.

Order affirmed, without costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, and *Ingraham, J.*, concur.

## ARREST. AFFIDAVITS.

### N. Y. SUPERIOR COURT. GENERAL TERM.

Josiah Harris, *respt.*, v. Hiram H. Durkee, *applt.*

Decided March 3, 1884.

Where the certificate to the notary's jurat to an affidavit verified out of the State is defective the affidavit is a nullity, and an order of arrest granted on it must be vacated. The defect is jurisdictional and the affidavit cannot be ordered from the files for amendment.

Appeal from an order at Special Term, denying defendant's motion to vacate order of arrest, and allowing plaintiff to amend an affidavit on which the order was granted, by obtaining a proper certificate of the prothonotary annexed thereto.

The order was granted under subdivision 3 of § 550 of the Code of Civil Procedure, in an action for moneys received in a fiduciary capacity, upon affidavits made by plaintiff and others. Plaintiff's affidavit was taken at his residence in the State of Pennsylvania, before a notary public, and the certificate of the prothonotary of the Court of Common Pleas was attached. Defendant moved to vacate the order of arrest on the ground, among others, that the certificate of the prothonotary to said affidavit was defective in the following particulars: (1). It did not state that E. Stewart Elliot,

the party before whom the affidavit was taken, was a notary public; simply that he was an "acting" notary. (2). It did not state that he was authorized to take affidavits or acknowledgments of deeds to be recorded in this State. (3). It did not state that the prothonotary was acquainted with the handwriting of the notary. Plaintiff asked permission to amend by procuring a new certificate, and was allowed so to do, upon terms, by the court, and from the order made and entered to that effect defendant has appealed.

*Bagley & Thain*, for *applt.*

*Rollin G. Beers*, for *respt.*

*Held*, That the paper purporting to be an affidavit, on which the order of arrest was granted, was not an affidavit, because the acknowledgment or certificate of proof did not comply with the Laws of 1848, chapter 195, § 2, as amended by the Laws of 1867, Chapter 557. It is as though the order of arrest had been granted on an unverified written statement. This the judge who granted the order had no power to do. The defect was a jurisdictional one, and the court had no power to order the affidavit to be taken from the files and sent to another State, there to be acknowledged as required by the law above referred to.

Order reversed, with \$10 costs and disbursements, and order of arrest vacated, with \$10 costs.

Opinion *per curiam*; present, *Sedgwick, Ch. J.*, *O'Gorman* and *Truax, JJ.*

# FRIVOLOUS ANSWER. PROMISSORY NOTE.

N. Y. SUPERIOR COURT. GENERAL TERM.

Jacob F. Wyckoff, *respt.*, v. Elisha W. Andrews, *impld.*, *applt.*

Decided March 3, 1884.

An answer must be clearly bad and not calling for deliberation of the issues it attempts to make, to support judgment for its frivolousness.

Where the complaint in an action against the endorsers of a note does not plead demand, protest and notice, but alleges a waiver thereof "at or about the date of maturity of the note," and fails to allege a promise outside the note, and the answer alleges that the waiver was not in fact made till after maturity, though defendants supposed the note was not then due, judgment cannot be taken for the frivolousness of such answer.

Appeal by defendants from an order granting plaintiff's motion for judgment on the ground of the frivolousness of the answer.

The complaint is against the endorser of a promissory note, and does not allege that demand of payment and notice of non-payment were or were not made and given, but alleges "that at or about the date of the maturity of said note, each of the said individual defendants, in writing, duly and wholly waived demand of payment, protest and non-payment, and protest of said note." It does not aver that the defendant at the time of the alleged waiver or at any time de hors the note, promised to pay it, or its amount. The answer alleges, as to the waiver,

that it was in fact made after the maturity of the note, although at the time of waiver the defendants thought the note had not matured.

*Redfield, Hill & Lydecker*, for *appls.*

*W. J. Butler*, for *respt.*

*Held*, That to support a judgment ordered for frivolousness of answer, the answer must be clearly bad and not calling for deliberation upon the issues it attempts to make.

On the answer as to the waiver being after maturity, a question is, what is the effect of waiving a demand which should have been made in the past. If waived before maturity, the principle of *estoppel in pais* binds the endorser. But otherwise, how are rights that have become fixed affected? If there be a promise to pay after maturity, the law is well settled. But does a mere waiver, and no more, create an implied promise which would be of value equivalent to an express promise. Or do the waiver and the circumstances under which it was made make a question for the jury as to whether the parties understood that the endorser did promise to pay with a knowledge of the *laches*. If there be a waiver of the kind pleaded, and it proves, in any way, as a matter of law or of fact, through a jury, that the defendant promised to pay, is the plaintiff to show that the defendant had knowledge of *laches*, or the defendant to show that he had not. At least, some of these questions are of a relevancy and solid-

ity that prevents its being frivolous to raise them.

Order reversed, with \$10 costs and disbursements, and motion denied, \$10 costs to defendant to abide event.

Opinion per curiam, *Sedgwick, Ch. J.*, and *Truax, J.*, present.

## HABEAS CORPUS. EXTRA-DITION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Otto A. Nubell v. Thomas Byrnes et al.

Decided May 19, 1884.

In case the provisions of section 5278 of the Revised Statutes of the United States have been complied with, the Executive of the State upon whom requisition is made for the arrest of the fugitive has no discretion to inquire into the facts certified by the Executive demanding the accused, but the duty is imperative to issue his warrant for the arrest of the fugitive, and to deliver him to the Executive authority or the agent of the Executive authority making the demand.

When a warrant is issued under the provisions of the above sections of the Revised Statutes of the United States for the arrest of a person the warrant containing only the initials of the Christian name and the surname and by demurrer and traverse the issue is made that the person arrested is not the person named, it is the duty of the court to take proof upon the question of identity, and if such proof establishes the identity of the person named to be the person intended, then the writ of habeas corpus should be dismissed and the relator returned to custody.

The presumptions of law are in favor of the regularity of a warrant.

Appeal from an order dismissing a writ of habeas corpus.

The relator was arrested upon a

warrant issued by the Governor of New York in conformity to a requisition made upon him by the Governor of the State of Illinois for the arrest and return to that State of O. A. Nubell, who there stood charged with the crime of conspiracy committed in the county of Cook in the State of Illinois. The return made to the writ was the warrant of the Governor of our State, which recited that it had been represented by the Governor of the State of Illinois that Nubell had been so charged and that he had fled from justice in that State, and taken refuge in the State of New York, and that the representations were accompanied by an indictment and affidavit, whereby the said O. A. Nubell is charged with the said crime and with having fled from said State and taken refuge in the State of New York, which were certified by the Governor of Illinois to be duly authenticated. No other return was made to the writ except the warrant by the Governor.

*E. P. Wilder*, for applt.

*Peter B. Olney*, District-Attorney.

*Held*, That the presumptions are in favor of the regularity of the warrant aforesaid and that from the recitals therein it must be inferred that the facts recited in the warrant are true, and such being the case the Executive of the State upon whom the demand has been made has no discretion to inquire into the facts certified, but must cause the arrest and surrender of the accused as required by section



5278 of the Revised Statutes United States and the Constitution of the United States.

The fact that the indictment is against O. A. Nubell does not render it void. Such an indictment would not be void at common law. And the question of its regularity can only be properly raised in the State of Illinois where the indictment was found. 24 How., U. S., 66; 84 N. Y., 438; 4 McCord, 487; 2 Hawk. C., 23, Sec. 125; 16 Mass., 141; State v. Burnell, 29 Wis., 435; 53 Ala., 476; 2 Hale, 238. The misnomer in the indictment could only be properly taken advantage of by plea in abatement.

But the return and demurrer and traverse thereto raise an issue as to the identity of the person named with the person intended, and such being the case the court below should not have dismissed the writ but should have taken proof on the question of identity. This was not done, but the demurrer was overruled and the writ of habeas corpus dismissed. This direction requires to be corrected. The order should be reversed and an order entered sustaining the demurrer, with liberty to the respondents to amend their return by adding the statements and establishing the fact by proof that the relator is the same person named in the warrant under which he is now held in custody. And in case that proof shall be made, then it will follow of course that the writ should be dismissed and the relator returned to the State of Illinois.

Opinion by *Daniels, J.*; *Davis*, and *Brady, JJ.*, concur.

## CONTEMPT. ALIMONY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Virginia Ryer, *respt.*, v. Frank Ryer, *applt.*

Decided May 29, 1884.

An order adjudging a party in contempt and directing his commitment for failure to pay alimony need not contain an adjudication that payment of the alimony could not be enforced by means of security or the sequestration of his property. Neither §1772 nor §1773 requires such adjudication to be stated or recited in the order.

The court will presume, where such an order is collaterally attacked, nothing to the contrary appearing, that the affidavits and proofs upon which same is based were sufficient to warrant granting the order.

A party will not be released from imprisonment by reason of inability to comply with the judgment directing the payment of alimony, when the inability has arisen from defendant's marrying again, in another State, in violation of the provisions of the judgment of divorce. Such inability voluntarily and intentionally created does not entitle the applicant to the favorable consideration of the court.

Appeal from order denying motion to discharge defendant from imprisonment. The defendant was adjudged guilty of contempt, and a commitment directed for his failure to pay, as required by the provisions of a judgment, \$5 a week alimony.

The application for his release was based upon the ground first, that the order contained no adjudication that payment of the alimony could not be enforced by means of security or the seques-

tration of his property; and second, because defendant could not comply with the terms of the judgment requiring the payment of alimony. The defendant had been imprisoned between six and seven months at the time of the application for his release.

*Baker, Bailey & Baker*, for applt.

*H. M. Collyer*, for respt.

*Held*, That neither section 1772 nor section 1773 of the Code requires that the order adjudging a party guilty of contempt and directing his commitment for failure to pay alimony shall recite an adjudication that payment of the alimony could not be enforced by means of security or the sequestration of the property of the delinquent, nor is any such recital or statement in the order necessary. The court will presume, the order being collaterally attacked, that the facts were sufficient to justify the granting of the order.

The court may release such an offender under §2286 of the Code from imprisonment in case he is unable to pay the alimony. But in this case the inability of the defendant to pay the small amount directed, of \$5 per week, seems to have arisen out of the fact that he, soon after the judgment against him, married again in another State, and by that marriage became obligated to devote his earnings to his second wife. Were it not for this marriage there is reason to believe from the statements contained in the affidavits that he would have been able to

comply with the directions contained in the judgment for the payment of alimony. The defendant voluntarily and intentionally created the disability in violation of the judgment of the court, and is not entitled to its favorable consideration. The order below denying his release was properly granted.

Order refusing defendant's discharge affirmed, with costs and disbursements.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### REPLEVIN.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Guilford Harris, *respt.*, v. Peter W. Lyman et al., *appls.*

Decided April, 1884.

In order to maintain replevin, plaintiff must show a right to have delivery of the property at the time of issuing the writ.

Appeal from judgment on verdict at Circuit.

Replevin for an ice wagon and a set of single harness. Defendants pleaded justification of the possession by virtue of certain judgments and executions. On June 7, 1880, the sheriff held four executions, two against plaintiff and one Rich, and two against Rich alone, by virtue of which the sheriff levied upon certain property as the property of Rich, including the ice wagon, and, as defendants claimed, the harness, also. Sale under said executions was postponed from time to time.

and on June 28, 1880, the First National Bank of Carthage recovered judgment against Rich and one F., on which execution was issued Aug. 20, 1880, to appellant Lyman, deputy sheriff, who next day levied upon certain property as the property of Rich, including the articles in suit. Plaintiff claimed the ice wagon was exempt as being necessary to Rich in his business of ice dealer, and that intermediate the two levies it was sold by Rich to plaintiff. Rich was a carpenter by trade, and shortly before the sheriff's levy he had discontinued the ice business. The judge charged that although Rich was changing his business at the time of the levy, he had a right to dispose of the wagon and convert its proceeds into property necessary to his new business, which in turn would be exempt. The only question submitted to the jury was whether the property claimed by Rich to be exempt, including the ice wagon, exceeded \$250 in value, and the jury were instructed that in case that amount was not exceeded plaintiff was entitled to recover for the wagon. They were also instructed that there was no evidence that the sheriff levied on the harness, and therefore that plaintiff was entitled to recover therefor. The jury found plaintiff entitled to possession of both articles. The Court refused to submit to the jury the question whether the harness was not embraced in the sheriff's levy. The harness was distinguished from the others by being nickel plated.

The sheriff's memorandum of levy included an item of "4 sing. harnesses," and the officer who made the levy testified, "I levied on one single harness. I think it was nickel trimmed." After levying on the wagon, the sheriff left it in charge of Rich.

*A. E. Kilby*, for appls.

*H. J. Welch*, for resp't.

*Held*, That the question whether the harness was not embraced in the sheriff's levy was raised by the testimony and should have been left to the jury.

The wagon was in the custody of the law until it was levied on under the bank execution. The original levy was valid unless the property was exempt, and Rich alone could claim the exemption. When plaintiff purchased it the exemption ceased, but the levy remained in force. Plaintiff could not then have recovered the property from the sheriff, and as it continued rightfully in the custody of the law until defendant made his levy plaintiff cannot maintain replevin for it. 3 Hill, 576; 3 Pick., 255, 258.

Moreover, the Court erred in excluding evidence going to show the value of one of the double wagons levied on (other than the ice wagon), which Rich claimed to be exempt. The evidence bore directly on the question of value of the exempt property.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## EMINENT DOMAIN.

## N. Y. COURT OF APPEALS.

*In re* application of the Water Comrs. of Amsterdam to acquire rights and lands of Chalmers et al.

Decided June 24, 1884.

The estate acquired by the village under proceedings to take lands instituted pursuant to Chap. 101, Laws of 1881, as amended in 1882, is a fee in the land so taken.

In such proceedings the commissioners rejected evidence offered to show the fair market value of the remainder of the owner's farm after the strip described was taken therefrom and allowed evidence as to the value thereof after taking therefrom the permanent right or easement to enter upon said strip to lay conduit and to enter thereon to make repairs. *Held*, Error.

Commissioners were appointed under Chap. 101, Laws of 1881, as amended by Chap. 197, Laws of 1882, an act providing "for a supply of water in the village of Amsterdam." They presented a petition to the Supreme Court which set forth the real estate required and that they were unable to agree with the owners as to price, and asked for the appointment of Commissioners of Assessment. The petitioners set forth that they desired to procure the lands described for the purpose of conducting water through and across them and laying down pipes or other suitable conductors for that purpose in connection with the system of water-works to be constructed for the village of Amsterdam. The property owners were notified of the application. The Commissioners of Assessment were appointed and upon the hearing before them C., one of the land

owners, while testifying in his own behalf, was asked to state the fair market value of the remainder of his farm after the Water Commissioners became seized in fee of the strip described in the petition. This question was objected to as incompetent, improper and immaterial and because there is no authority for assuming that the Water Commissioners would become seized in fee of the premises. The objection was sustained. Similar questions were put to witnesses called by the owner but were excluded. Witnesses for the petitioners were asked by them as to the value of the farm "upon taking therefrom the right or easement to enter upon the strip proposed to be taken for the conduit, and lay therein conduit pipes for water, with the permanent and perpetual use thereof for that purpose, with the right to enter it at such times as might be necessary to make repairs and maintain the conduit." This was objected to by the owner, as assuming a state of facts not authorized or warranted as to the rights and property sought to be acquired by this proceeding, and because the petitioners seek to acquire and will acquire and become seized in fee of the strip of land in question, and the only rule of compensation is the sum the farm will be worth less than it is now, by reason of the village of Amsterdam being seized in fee of the strip. Similar questions were put to other witnesses and allowed to be answered; the rulings being excepted to. The Commissioners of Assessment re-

ported a small amount as damages sustained by the owner of the real estate described in the petition "by reason of the taking by the Water Commissioners of Amsterdam of the right to enter upon and use the said real estate for the purpose of conducting water through and across the same, and laying down pipes or other suitable conductors, for that purpose, in connection with the system of water-works to be constructed for the village of Amsterdam," adding in their report, "the following is the property sought to be acquired by said Water Commissioners \* \* \* and for which said compensation is awarded, the right to enter upon and use the following described lands." Then followed a description by metes and bounds, as in the petition, of the strip above referred to. The Act of 1881, as amended, under which the proceeding was instituted, provides that upon confirmation of the report of the Commissioners of Assessment, and the payment of the sum awarded, "the village shall become seized in fee of the property so required."

*J. M. Carroll*, for applt.

*M. L. Stover*, for respt.

*Held*, That the rulings as to the admission and rejection of evidence were erroneous. That in view of the character of the work to be undertaken, its permanency and the need of public possession and control over the lands, and the express language of the act defining the estate to be acquired, it is clear the Legislature intended that the right acquired should be

unlimited. Nothing less than a title in perpetuity. 79 N. Y., 293. The use described in the petition is an exclusive one, which can only be lawfully enjoyed after the acquisition of a fee.

Order of General Term, affirming order confirming the report and award of the commissioners, reversed and report set aside and a rehearing ordered.

Opinion by *Danforth, J.* All concur, except *Rapallo, Miller* and *Earl, JJ.*, dissenting.

#### PARTNERSHIP. EVIDENCE.

N. Y. COURT OF APPEALS.

*Finley et al., appls., v. Fay, respt.*

Decided June 27, 1884.

In an action to recover for an indebtedness of defendant to a firm of which he was formerly a partner the answer set up an agreement by defendants, in consideration of a transfer of defendant's interest, to save him harmless from liability for the firm indebtedness. *Held*, That the agreement did not preclude proof that on a settlement at the time of such transfer it was found that defendant was indebted to the firm and agreed to pay, or prevent plaintiffs from recovering thereon.

Reversing S. C., 8 W. Dig., 49.

This action was brought to recover an amount alleged to be due from defendant to plaintiffs' firm on account of an overdraft by him while a partner of said firm. The complaint alleged that at the time of the dissolution of the copartnership there was a settlement of the firm accounts, by which it was found that there was due plaintiffs from defendant \$16,000, which he

agreed to pay. Defendant set up in his answer an agreement dated February 7, 1876, dissolving the copartnership, by which defendant withdrew from the firm, transferred his interest in its assets to the plaintiffs, and they in turn agreed to save him harmless from the payment of any and all indebtedness of the late firm. Plaintiffs sought to prove by parol the settlement set forth in the complaint. The evidence was excluded.

*Frederick Collins*, for applts.

*Seymour Dexter*, for respt.

*Held*, Error; that the written agreement set out in the answer could not prevent plaintiffs from giving the proof offered and recovering upon the cause of action alleged by them.

Judgment of General Term, affirming judgment of nonsuit, reversed and new trial granted.

*Per curiam* opinion. All concur, except *Ruger, Ch. J.*, and *Miller, J.*, dissenting.

## LOTTERIES.

### N. Y. COURT OF APPEALS.

*Kohn, respt., v. Kohler, applt.*

Decided June 24, 1884.

A loan made with a view of obtaining money to carry on the government of a nation, and which contains a provision by which the amount can be increased as to a portion of it upon a contingency named therein, does not constitute a lottery, and is not in violation of the constitution and laws of this State prohibiting lotteries.

Lotteries subject to condemnation of the constitution and laws are schemes where money is paid for the chance of receiving money in return.

On May 15, 1877, plaintiff purchased of defendant, for \$72, an Austrian government bond, being a part of the Royal Imperial Loan of March 15, 1860, for the use and benefit of the government. The bond provides for the payment of 100 guilders by the Austrian government, in accordance with the conditions indorsed on its back, together with one-fifth of such sum as may be allotted to the prize number of the bond, which sum must amount to at least 120 guilders, with interest, as provided. The indorsement on the back of the bond provided for the drawing of the bonds by a division into series, and the drawing of a certain number of series tickets, to be deposited in a wheel, to await the drawing of the prize numbers. At a time named the series numbers are to be drawn from, and provision is also made for the drawing of the prize numbers deposited in another and separate wheel, and the last-named drawing designates the numbers which are entitled to prizes, which vary from 600 guilders to 300,000. Under the terms of the loan for which the bonds were issued the holder is entitled to receive his principal and interest, and a premium of 20 per cent., and what is termed a prize, if by the drawing provided for he becomes entitled to the same. The bonds were sold by the government for the principal sum named in each one. Plaintiff claims to recover double the purchase money under Section 32 of Article 4 of Title 8, Part I., Chap. 20 of the Revised Statutes (2 R. S., 6th

ed., 923) on the ground that the bond was a share in a lottery.

*Benno Loewy*, for applt.

*Leo Goldmark*, for respt.

*Held*, That plaintiff was not entitled to recover.

A loan made with the view of obtaining money to carry on the government of a nation, and which contains a provision by which the amount can be increased as to a portion of it upon a contingency named therein, does not constitute a lottery scheme, and is not in violation of the constitution and laws of this State prohibiting lotteries.

A lottery exists where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it. 56 N. Y., 427; Penal Code, § 323. Lotteries subject to condemnation under the constitution and laws of this State are schemes where money is paid for the chance of receiving money in return.

The issue or sale of the bonds of which the bond in suit was one was not a gift enterprise within the provision of the Penal Code. § 323.

Order of General Term, reversing judgment on report of referee dismissing complaint, reversed, and judgment on report of referee affirmed on stipulation.

Opinion by *Miller, J.* All concur, except *Finch, J.*, dissenting.

#### APPEAL. HABEAS CORPUS.

N. Y. COURT OF APPEALS.

*In re Larson.*

Decided June 27, 1884.

An order directing a further return to a writ of habeas corpus or certiorari is not appealable to the General Term.

This is an appeal from an order of the General Term, reversing an order of a Justice of the Supreme Court directing a further return to the writs of habeas corpus and certiorari issued by him on behalf of the petitioner. It is claimed that the order of the Justice was not appealable to the General Term.

*Miller & Savage*, for applt.

*Edward Gebhard*, for respt.

*Held*, That the General Term had no authority to entertain the appeal or to determine whether the Justice was authorized to make the order. Code Civ. Proc., § 2058.

Order of General Term, reversing order of Special Term, reversed, and appeal to General Term dismissed.

*Per curiam* opinion. All concur.

#### CONTRACT. DAMAGES.

N. Y. COURT OF APPEALS.

*McLean, respt., v. McLean, applt.*

Decided June 24, 1884.

A contract between tenants in common to sell the premises within a given time for a specified price, or after that time at public auction, contained a provision that if either party should fail or refuse to execute a deed of the premises he should pay \$500 to the other party as liquidated damages for non-performance. *Held*, That this provision was intended as an indemnity against liability to a vendee for damages to which each party would be exposed on a failure

by the other to perform a contract made by one and binding on both, and that it did not apply to a contract made by one owner which contained a clause exempting him from liability for damages in case his co-owner failed to convey.

In January, 1881, plaintiff and defendant were owners as tenants in common of certain premises which they entered into an agreement to sell for \$31,000; if the premises were not sold in a year either party was authorized to employ an auctioneer to suitably advertise and sell the property at public auction, within thirty days, at the best price the auctioneers can get, proceeds of sales to be divided equally between the parties to the agreement. It was also provided that, at the time appointed by the party securing the customer, each party should execute a deed of the premises, and that in case either of the parties failed or refused to execute and deliver a proper deed as prescribed, and the purchaser should be ready to fulfil, then the party so failing should pay to the other party \$5,000 as liquidated damages for non-performance of the agreement. On March 14, 1881, plaintiff entered into a contract with one T. for a sale of the premises for \$31,500, and defendant was notified of this contract and of the place appointed for its fulfilment, and was requested to join plaintiff in the execution of a deed to T. This contract exempted plaintiff from liability to T. for damages in case of a refusal by defendant to convey. At the time appointed defendant failed to attend and did not join in the deed in question.

Plaintiff thereupon brought this action.

*John E. Parsons*, for applt.

*N. C. Moak*, for resp't.

*Held*, That plaintiff was not entitled to recover; that the contract of plaintiff with T. was not the contract of both co-tenants, but the individual contract of plaintiff as vendor with T. as purchaser; that the clause in the agreement between plaintiff and defendant as to liquidated damages referred to a contract containing mutual covenants on the part of the contracting parties, which one of the vendors should refuse to complete. This clause was to serve as a protection against liability to a vendee for damages to which each party would be exposed by the failure of the other to perform a contract entered into by one and binding on both, indemnity against the joint liability of both for the default of either was the main purpose of the clause in question.

Judgment of General Term, affirming judgment for plaintiff, reversed, and complaint dismissed.

Opinion by *Andrews, J.* All concur.

## ASSESSMENTS.

### N. Y. COURT OF APPEALS.

*In re* petition of Hearn to vacate assessment.

Decided June 27, 1884.

A certificate of the Commissioner of Public Works specifying the amount of the assessment, and that "the apportionment of the assessment may be made," is not a compliance with the requirement of § 8 of Chap. 665, Laws of 1865. The statute im-



poses the duty of apportionment on the Commissioner, and the power to do so cannot be delegated by him.

The petitioner sought to vacate an assessment laid by the Board of Assessors in 1883. On April 27, 1880, the Commissioner of Public Works certified in writing that the work for which the assessment was made had been completed and accepted by the Department of Public Works; that the total cost was \$29,562.04, and added at the close of the certificate, "the apportionment of the assessment may be made." The Board of Assessors then assessed upon the property benefited by the improvement a little less than one-half of the total cost, as reported by the Commissioner. Chapter 565 of the Laws of 1865, under which the Boulevard was laid out and improved, provides (§ 8) that "such amount or portion of the expense of such regulating, grading and improvements as the said Commissioners (of Central Park) may deem equitable and determine, not exceeding, as to streets and roads more than one mile in length, one-half of such expense, shall and may be assessed upon the owners and occupants of the lands, &c., benefited." By Chap. 879 of the Laws of 1872, the powers vested in the Commissioners of Central Park by the Act of 1865, in respect to the improvement in question, were transferred to and vested in the Department of Public Works, and thereafter the Commissioner of Public Works was vested with the power and discretion of fixing the share of the ex-

pense of improving the Boulevard which should be a local charge.

*Charles E. Miller*, for applt.

*D. J. Dean*, for respt.

*Held*, That the certificate of April 27, 1880, was not a compliance with the requirements of the statute, and in no sense a determination by the Commissioner of Public Works of the equitable share of the expense to be assessed upon private property. The duty of apportionment the statute imposed upon the Commissioner, and the power so conferred could not be delegated by him.

Order of General Term, reversing order of Special Term vacating assessment, reversed, and order of Special Term affirmed.

Opinion by *Andrews, J.* All concur.

## VENUE.

N. Y. COURT OF APPEALS.

*Acker et al., respts., v. Leland et al., applts.*

Decided June 27, 1884.

An action to set aside a general assignment which comprises real as well as personal estate is local and must be tried in the county where the real estate is situated.

A motion to change the venue to such county may be made, although the complaint does not disclose that the assignment embraces real property; that fact may be shown by affidavit.

The above entitled action was brought in the county of New York, to set aside a general assignment, made by defendant L. to his co-defendant B., on the ground that it was made with intent to hinder, delay and defraud the

plaintiffs and other creditors of L., and for the appointment of a receiver. It appeared by the affidavits and schedules that the assignment comprised real and personal property, the principal part of which consisted of real estate in Albany and Saratoga counties, none of the real estate assigned being situated in the county of New York. A motion was made by defendants to change the place of trial to Albany County, which was denied.

*N. C. Moak*, for applts.

*Stephen A. Walker*, for respts.

*Held*, Error; that the action was local and triable in Albany or Saratoga County. Code Civ. Pro., § 982.

It was claimed that, as the complaint did not disclose that the assignment embraced real property, defendants could not move for a change of place of trial.

*Held*, Untenable; that it was proper for defendants to show facts by affidavit in aid of their motion.

A motion to change the place of trial under Section 987 of the Code of Civ. Pro. for convenience of witnesses or other cause can only be made after the action is put in the situation in which defendants were entitled to have it placed when commenced. 83 N. Y., 156.

It was also claimed that this action only affects the title to real estate indirectly and incidentally.

*Held*, Untenable.

Order of General Term, affirming order denying motion, reversed, and motion granted.

Opinion by *Andrews, J.* All concur.

## RAILROADS. EMINENT DOMAIN.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*In re* application of the N. Y. C. & H. R. RR. Co. to appraise lands of Caroline Pierce et al.

Decided June, 1884.

The right to institute the proceeding provided for by Ch. 237, Laws of 1869, so far as the company's *status* is concerned, is established *prima facie* by showing that the petitioner is a company actually owning or operating a steam railroad.

The company's determination that the land is necessary for the purposes of the company is sufficiently shown by its action in instituting the proceeding.

Appeal from Special Term order confirming the referee's report herein, and appointing commissioners to appraise the property.

A proceeding under Ch. 237, Laws of 1869, which amends § 21 of the general railroad act of 1850. The proceeding is instituted upon the company's petition, verified by one of its officers, for the purpose of acquiring title to lands described in the petition, owned by appellants, which the petition alleges adjoin the land of petitioner and are required by it for certain purposes of its incorporation specified in the petition.

*John G. Milburn*, for owners, applts.

*George C. Greene*, for RR. Co., respt.

*Held*, It is not incumbent on a

company owning or operating a railroad and seeking to acquire additional real estate under the Act of 1869 to allege in its petition and prove all the essential facts required in a proceeding under the Act of 1850 to acquire land for an original route. It is enough, in the first instance, that the petitioner, by its allegations and proofs, shows that it is a company actually owning or operating a steam railroad. 4 Hun, 381.

That the governing body of the corporation has formally decided that the land is necessary is sufficiently shown by the company's action in instituting this proceeding.

The evidence does not justify the conclusion that the negotiations by the company's agent preceded his instructions, or that the agent acted without authority. The president had power to negotiate for the company. 67 N. Y., 377. That the function was one he could depute to an agent is not questioned by appellants.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Barker, Haight* and *Bradley, JJ.*, concur.

#### EQUITY. CREDITORS. PARTIES.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Amariah H. Bradner et al., respts., v. Joseph B. Holland et al., impled., applts.*

Decided June, 1884.

The fact that the property sought to be reached by creditor's bill is owned by the judgment debtors in severalty is no ground of objection to joining them all as defendants.

Appeal from interlocutory judgment, entered on Special Term decision overruling demurrer to complaint with leave to defendants to answer on terms.

The complaint charges that plaintiffs recovered judgment against defendants Holland; that execution thereon has been returned unsatisfied; that Melinda Butterfield died, bequeathing to each of defendants Holland \$4,000, and appointing defendant Butterfield her executor. The relief demanded is that plaintiffs have a lien upon said legacies, with injunction, &c. Defendants Holland demurred severally on the grounds, (1.) That the complaint fails to state facts sufficient to constitute a cause of action. (2.) That there is a misjoinder of causes of action therein particularly specified. Defendant Butterfield does not appear.

*Geo. Forster*, for applts.

*James Wood*, for respts.

*Held*, The action is in the nature of a creditor's bill to reach property of judgment debtors not subject to levy and sale by execution. It is at least proper to join the judgment debtors as defendants. 4 Paige, 309; 5 id., 505. The remedy is equitable and not unusual. Old Code, § 167; New Code, § 484; 17 N. Y., 604.

Distinct rights of property of each of two or more defendants may be pursued by single action

against both or all in behalf of creditors to whom they are jointly liable and so charged by judgment, for the purpose of obtaining sales for them of it. 6 Johns. Ch., 139; 4 Cow., 682; 17 N. Y., 605; 5 Paige, 65; 20 Barb., 378; 6 Abb. N. C., 212. Distinguishing 94 N. Y., 22.

Defendants contend that to the alleged cause of action against one defendant Holland and Butterfield, the other defendant Holland is not a party, and therefore there is a misjoinder of causes of action. But the action has only in view the reaching and applying the property of the judgment debtors to the satisfaction of the judgment, which is a legitimate purpose of a single action like this. It is unnecessary to consider the question that might have arisen if Butterfield had demurred. A person may not be improperly, although unnecessarily, made a party defendant under some circumstances. 2 Paige, 278.

Judgment affirmed, with costs, with leave to defendants to withdraw demurrer and answer in 20 days on paying costs.

Opinion by *Bradley, J.; Smith, P. J., Barker and Haight, JJ.*, concur.

#### NEGOTIABLE SECURITIES. DEFENSE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edward Ellsworth, exr., v. The St. Louis, Alton & Terre Haute RR. Co.

Decided May 9, 1884.

Vol. 19.—No. 16a.

The right of a bona fide holder for value of a negotiable bond issued by a railroad company to recover thereon is not affected by the fact that the railroad sold the bonds at a discount contrary to the provisions of their charter, which forbade the sale of them at less than their par value.

Motion for a new trial upon exceptions ordered to be heard in the first instance at the General Term, after a verdict directed in favor of defendant.

This action was brought to recover the amount of thirty bonds of the sum of \$1000 each, made by defendant, payable with interest at the rate of ten per cent. It was not asserted on behalf of defendant that the bonds were not duly and properly executed, or that plaintiff is not the owner of them in good faith, or that the interest which became due was not paid by the company for a period of eight years, and up to the 1st of March, 1878. The defense set up is that by the charter the bonds could not be sold for less than their par value; that these bonds were sold at 90 per cent. or less; that such sales were illegal and void, conferring upon the purchasers no right to have or to hold them, or to enforce them against defendant.

*W. A. Coursen*, for plff.

*G. A. Strong*, for deft.

*Held*, Error. The right of plaintiff, who is a bona fide holder for value of the negotiable bonds in suit issued by defendant, to recover is not affected by the fact that the railroad sold the bonds at a discount contrary to the provisions of their charter which forbade the sale of them at less than

their par value. 1 Wall., 93; 1 Black, 386.

Furthermore, the payment of the interest upon the bonds for a period of eight years may properly be regarded as a direct ratification of the act of the company.

Judgment for plaintiff.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

### CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Thomas L. Vickers, *respt.*, v. Charles G. Moore, *applt.*

Decided May 9, 1884.

Plaintiff agreed to print and deliver to defendant one hundred thousand pamphlets for \$400. He in fact printed and delivered ninety-seven thousand, three hundred and fifty. *Held*, That the delivery of the entire 100,000 pamphlets was, by the contract, made a condition precedent to plaintiff's right to recover, and that he could not recover in the absence of any waiver of such condition precedent for those actually delivered.

Appeal from judgment entered on verdict of a jury.

This action was brought upon a contract made between plaintiff's assignor and defendant, by which the former agreed to print and deliver to the latter 100,000 pamphlets for \$400. He in fact printed and delivered 97,350. By the verdict at circuit plaintiff was allowed to recover for the pamphlets actually delivered.

*Freling H. Smith*, for *applt.*

*A. J. Perry*, for *respt.*

*Held*, Error; the contract was an entirety and plaintiff did not

perform it, nor is any excuse given for not performing it.

From the evidence there was no ground to claim that defendant consented to receive the 97,350 as a performance of the contract upon any ground. He refused to receive any of them, as not being in performance of the contract. It was the duty of plaintiff's assignor to proceed and complete the contract under such circumstances before bringing any action, and the motion to dismiss the complaint should have been granted.

Furthermore, from the evidence it appears that the work was done improperly, and that defendant protested against the character of the work and seems to have been not willing to accept it. The verdict to the contrary was unsupported by the evidence.

Judgment reversed; new trial granted, with costs to abide the event.

Decision by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

### LEGACIES. PERPETUITIES. JUDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Asa L. Shipman, *exr.*, *respt.*, v. Isabella G. Rollins et al., *appls.*

Decided May 9, 1884.

A voluntary unincorporated association is incapable of taking a legacy, and a legacy bequeathed to such an association is invalid, and the property so bequeathed vests in the testator's next of kin if not otherwise disposed of, and the subsequent incorporation of the association will not divest the title of the next of kin.

The testator bequeathed to his wife the income of a certain portion of his real estate for life and directed his executors to sell so much of the remainder of said real estate as should be necessary to create a fund which would produce an income of \$1,500, which he directed to be paid to his wife for life, and after her death he directed the remainder of his real estate to be sold and a fund created which should be divided into eight portions. The will then contained the following clause: "One portion I give to the American and Foreign Christian Union." *Held*, That the legacy to said American and Foreign Christian Union vested at the death of the testator.

The will also contained the following clause: "Two other portions I give to the first Reformed Low Dutch Church that may be built after the year 1856 between the Fifth avenue and the East River and Seventy-ninth and Ninety-fifth streets." *Held*, That if this legacy was contingent it created an unlawful suspension of alienation.

When a judgment in an action establishes a right of a person not a party to such action, such person, although he is not bound by said judgment, may elect to take advantage of it, and if he does so the parties to the action are bound by it.

Appeal from judgment recovered at Special Term.

This action was brought by plaintiff as surviving executor to obtain the direction of the court for the distribution of so much of the estate as remained undistributed. The testator bequeathed to his wife the income of a certain portion of his real estate for life, and directed his executors to sell so much of the remainder of said real estate as should be necessary to create a fund which would produce an income of \$1,500, which he directed to be paid to his wife for life, and after her death he directed the remainder of his real estate to be sold and a fund created by adding the proceeds to the sum

already set aside to produce the income of \$1,500, and that such sum should then be divided into eight equal portions. The will then contained the following clause: "One portion I give to the American and Foreign Christian Union \* \*." At the time of the testator's death this Union was a voluntary unincorporated association, but it had become incorporated before the death of his widow and consequently before the time set for the payment of the legacy to it.

*J. H. K. Blauvelt, Jas. K. Hill, Wing & Shoudy and Alfred Roe*, for applts.

*H. P. Allen, Chas. H. Knox, S. H. Thayer and John E. Parsons*, for respts.

*Held*, That the legacy to the American and Foreign Christian Union was designed to become vested immediately upon the death of the testator, Jarman on Will's, 5 Am. Ed., 835, and Note I.; 31 N. Y., 574, 589; 4 Abb. N. C., 317, 387; 2 Com., 73; 71 N. Y., 92-100; 76 id., 133; 43 id., 303, 368-9; and, since at that time the legatee was a voluntary unincorporated association, it was incapable of taking the share bequeathed to it, 46 N. Y., 144; 1 Keyes, 561, 567; 43 N. Y., 254-260; 88 id., 371-376; and consequently the amount of such bequest, being otherwise undisposed of, vested in the next of kin of the testator, and after so vesting their title could not be disturbed by the subsequent incorporation of the society.

The will also contained the following clause: "Two other por-

tions I give to the first Reformed Low Dutch Church *that may be* built after the year 1856 between the Fifth avenue and the East River and Seventy-ninth and Ninety-fifth streets.

*Held*, That if the above bequest should be held to be contingent it would not promote the interests of the society claiming it which was unincorporated at the time of the testator's decease, for in that case it would be invalid as creating an unlawful suspension of alienation. 2 R. S., 6th ed., 1167, §§ 1-2; 43 N. Y., 254-260.

A legacy was also given by the testator to the Woman's Hospital Association, and its right to such legacy was resisted in this action. It appeared that a previous action had been brought by the executors in which their obligation to pay this legacy had been drawn in question and in which it was adjudged that it was a valid bequest. The corporation, however, was not a party to said action and it was claimed by the executor that, as the judgment therein was not binding upon said corporation, it was not binding upon him on the ground that it should bind both or neither.

*Held*, That it was within the power of the association to accept the binding obligation of the judgment as fully and completely as though it had been a party to the action, and having done so the parties to said action could not object to the validity of the judgment.

Judgment reversed so far as it directed payment to the American

and Foreign Christian Union and certain other corporations situated in a like manner and the legacies bequeathed to them directed to be distributed among the next of kin; otherwise affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## INJUNCTION. NUISANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

George G. Hallock et al., exrs., et al., *appls.*, v. Rachel Scheyer et al., *respts.*

Decided May 29, 1884.

An injunction may issue to restrain a nuisance, as the remedy in equity is more adequate and better adapted to reach the justice of the case than a mere action at law for the recovery of damages.

Defendants, whose store adjoined that of the plaintiff Baranski, in Grand street, New York City, erected a show case, sign and fence eight feet and a half high and four feet wide, out on the walk in front of his store, which obstruction projected three feet upon the sidewalk beyond the front line of the adjoining building, so as to exclude from view Baranski's show window and store from persons approaching from one direction, thereby tending to exclude his customers from it, and to injure his business.

*Held*, A proper case for an injunction restraining the continuance and maintenance of the nuisance and illegal obstruction erected by defendant, and that Baranski, who was a lessee of the building, did not impair his right to relief by joining with him the executors of his lessor, as they may properly be regarded as parties in interest, as the obstruction tends to lessen the rental value of their premises.

Appeal from order denying motion for an injunction.

The plaintiff Baranski and defendants are occupants of adjoin-

ing stores upon Grand street, and partially engaged in the same line of business. It was shown by the complaint and sustained by the affidavits that defendants have placed a show case, sign and fence, extending from their store out upon the sidewalk in such manner and to such height—the height being eight and a half feet, and the width four feet, and the projection in front of the store out on the sidewalk being three feet—as to obstruct the light and obscure the view of Baranski's show window and of his store, thereby tending to exclude his customers from it.

*Benjamin H. Baylis*, for appls.

*Bogart & Hathaway*, for respts.

*Held*, That the court below erred in denying the motion for injunction *pendente lite*; that the facts established a proper case therefor.

That an injunction may issue to restrain a nuisance, and the remedy in equity is more adequate and better adapted to reach the justice of the case than a mere action at law for the recovery of damages. 13 Pick., 169; 4 Kern., 506, 526. A suit or suits for damages would not afford an adequate remedy.

The action was not defective because the executors of the lessor were also made parties. Hilliard on Injunctions, 3d ed., 332. They had an interest in securing the rental value of the property, and as such cannot be regarded as entire strangers to the controversy, for a continuance of the obstruction must to a certain extent reduce

the value of the occupancy of the property. But if they were not proper parties, as long as the tenant himself is a plaintiff in the action, and has a well-grounded cause of complaint, he may maintain it for the relief he may be able to secure, although the complaint in the end may be dismissed as to the executors. The fact that they may have been joined as unnecessary parties in the action forms no legal impediment in his way to that redress which the nature of the case indicates him to be entitled to claim.

Order reversed and motion for injunction granted, upon the usual undertaking being given in the sum of \$400, and the plaintiffs should be awarded costs and disbursements on this appeal.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## NEW TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Robert J. Anderson, *respt.*, v. The Market National Bank, *applt.*

Decided May 9, 1884.

A new trial will not be ordered on the ground that counsel was surprised at the ruling of the trial judge upon a point of law.

The law exacts great diligence from parties in discovering and obtaining their evidence, and if they fail to exercise it and are defeated because of that failure, the result cannot be avoided by an application for a new trial on the ground of newly discovered evidence.

If, after the trial of an action and verdict against the defendant, facts are discovered by the defendant which would have constituted a defense, and which were not con-



nected in any form with the subject-matter of the action or of the plaintiff's claim as it was made and understood in the action, but were entirely extraneous and outside of the investigations which would ordinarily be expected to be made in the course of such a controversy, and formed other and distinct transactions in which neither the defendant nor his counsel participated, a new trial will be granted, upon the defendant's application, to allow him to prove such facts in defense, and he will be permitted to amend his answer so as to set them up.

Appeal from order denying a motion for a new trial on the ground of surprise and newly discovered evidence.

This action was brought to recover the amount of two checks delivered by plaintiffs to one H. to take up two promissory notes. Instead of using the checks for this purpose H. transferred them to defendant, which collected and received the money on them and paid out a portion thereof on account of H. before notice was given to it of their misappropriation. After that payment, but before defendant had parted with any further amount of the proceeds of these checks, the evidence tended to show that notice was given to it of their diversion and a demand made on behalf of the plaintiffs for the balance of their proceeds. The evidence also tended to show that subsequent to such notice and demand defendant applied a portion of said balance to the payment of a preceding indebtedness of H. to it and then paid over the balance to the general assignee of H., who had in the meantime made a general assignment. The verdict rendered in this action was

for the balance of the checks remaining in the hands of defendant at the time of the notice and demand above referred to.

The ground of surprise on which a new trial was asked was the ruling of the court that defendant was liable for this balance under the circumstances.

*Abram Wakeman*, for applt.

*Rastus S. Ransom*, for resp't.

*Held*, That as that was a legal point the remedy for its correction, if it was erroneous, was by a different course of proceeding. That it would form in and of itself a proper foundation either for an application for a new trial or an appeal from the judgment, and to those remedies defendant was confined.

The newly discovered evidence relied upon as a ground for a new trial was that defendant's president could testify that no demand was made for the proceeds of the checks until after the payment of the final residue to the general assignee of H. and that plaintiff had made a statement of his entire claims against H., including that for the diversion of these checks, to his assignee and had received a dividend from said assignee upon the basis of said statement. No reference was made in the complaint to the receipt of this dividend, and the notice of application for a new trial included notice of a motion to amend the answer so as to set up these facts as a defense.

*Held*, That, as to the evidence of defendant's president, if that degree of diligence which is

required to be observed in the conduct of legal proceedings had been exercised in this case, his importance as a witness would have been discovered, as his evidence was upon an important part of the controversy and he was within reach of defendant and its counsel.

That the law exacts great diligence from parties in discovering and obtaining their evidence, and if they fail to exercise it and suffer defeat because of that failure, the result cannot be avoided by an application of this description.

That by receiving a dividend upon the basis of his entire claims against H. plaintiff to that extent received satisfaction of the demands recovered in this action, and it would be unjust to permit him to retain that benefit and still enforce another payment of the same amount against defendant, and a new trial should be ordered to correct such injustice, and since the facts constituting this defense were not connected in any form with the subject-matter of the action or of plaintiff's claim as it was made and understood in the action, but were entirely extraneous and outside of the investigations which would ordinarily be expected to be made in the course of such a controversy, and formed other and distinct transactions in which neither defendant or its counsel participated, defendant was not in default for failing to discover their existence earlier than it did. That since an order directing a new trial could be rendered effectual only by per-

mitting the above-mentioned facts to be set up in the answer by amendment, and since the notice was broad enough to include that relief, an order should be entered to the above effect.

Ordered accordingly.

Opinion by *Daniels, J.; Davis, P. J., and Haight, J.,* concur.

### DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* expected action of John A. Morris et al., admsrs., *appls.*, v. Edward Matthews, *respt.*

Decided May 29, 1884.

Section 872, Code Civ. Pro., does not sanction the granting of an order before the commencement of an action for the examination of the defendant in an expected action when such examination is professedly sought for the purpose of securing information upon which a complaint against him might be framed, and when there is no obstacle in the way of the plaintiffs in such expected action immediately commencing it, and no necessity is shown for taking the examination of the expected defendant in order to perpetuate his testimony.

Appeal from an order setting aside an order for the examination of Edward Matthews as a party to an expected action.

The order for the examination of Matthews was granted upon affidavits stating substantially that the representatives of one H., deceased, were about to commence an action against said Matthews for legal services which they had reason to believe were rendered said Matthews by said H., and that they were ignorant of the

amount and value of such services, and that the only person having knowledge upon the subject was said Matthews, and his examination was necessary in order to enable them to frame their complaint.

*W. M. Rosebault*, for applts.

*John W. Fiske*, for resp.

*Held*, That § 872 of the Code of Civil Procedure does not sanction the granting of an order, before the commencement of an action, for the examination of the defendant in an expected action when such examination is professedly sought for the purpose of securing information upon which a complaint against him might be framed, and when there is no obstacle in the way of the plaintiffs in such expected action immediately commencing it, and no necessity is shown for taking the examination of the expected defendant in order to perpetuate his testimony. 64 N. Y., 120; 29 Hun, 450.

That the affidavits upon which the order for the examination were granted were based almost entirely upon information and surmises, and for that reason were likewise wholly insufficient to sustain the order obtained upon them. 65 N. Y., 581; 78 N. Y., 252, 258.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

#### EVIDENCE. DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Saly T. Mayer et al., applts., v. Ferdinand Ehrlich et al., respts.*

Decided May 9, 1884.

The provisions of § 880 of the Code, requiring that the depositions of a party examined before trial shall, when completed, be carefully read and subscribed by the person examined and certified by the judge or referee taking it, and also within ten days thereafter be filed in the office of the clerk, is a provision for the benefit, so far as the requirement that the deposition shall be filed, of the party examined, and the provision requiring the deposition to be filed may be waived by the party examined, and is waived by his accepting and assenting to a stipulation leaving the examination open for his further cross-examination on two days' notice to the opposite party. And it is error for the trial court under such circumstances to exclude the deposition as evidence for the reason that the same was not filed in the office of the clerk under the provisions of § 880 of the Code, *supra*.

Appeal from a judgment rendered upon the dismissal of the complaint at circuit.

Action to recover damages sustained by reason of the false representation alleged to have been made by defendants by which plaintiffs were induced to sell wares and merchandise to an amount stated. The learned justice presiding in the court below dismissed the complaint upon the ground, as appears from his opinion, that the testimony did not establish the charge of false representations. He thought there was not sufficient evidence affecting that question to require that it should be submitted to the jury.

In the course of the trial plaintiffs offered portions of the deposition of the defendants taken before trial. Such deposition was excluded on the ground that the same had not been filed with the clerk according to the require-

ments of the statute, and exception was taken to such ruling. It appeared in evidence that after the examination before trial had been concluded apparently, the following stipulation was signed by the parties: "Defendants' counsel may cross-examine defendants or either of them at any time, on one day's notice to plaintiffs' attorney; but for the purposes of the order entered this day this examination herein shall be closed."

*Ira Leo Bamberger*, for applts.

*Francis B. Chedsey*, for respts.

*Held*, That the court erred in excluding the deposition offered by plaintiff's attorney.

The statutory provision in reference to the filing of the deposition is one which may be waived by the adverse party, and was in effect waived by defendants herein securing as they did the right of cross-examination, at any time, upon one day's notice—a provision which rendered it perfectly justifiable to withhold the deposition from the files of the court.

The provisions of the statute are safeguards created for the benefit of the party examined and are such as could be waived.

The evidence contained in the deposition on behalf of plaintiffs seem to have had some bearing upon the question of fraud. At all events, it is impossible for us to say that the exclusion of the deposition could not by any possibility have prejudiced plaintiffs' case.

Judgment reversed and new trial ordered, costs to abide the event.

Vol. 19—No. 16b.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels J.*, concur.

### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Helen Schell, respt.*, v. *Wm. Cockcroft, applt.*

Decided May 9, 1884.

In an action on a promissory note the borrower testified that the loan was procured from plaintiff through the agency of S., and testified to conversations occurring between himself and S. at the time of procuring the loan. Plaintiff subsequently testified that the transaction took place directly between the borrower and herself, and thereupon the evidence of the conversations between the former and S. were stricken out by the referee before whom the action was tried as not having been connected with plaintiff. *Held*, Error.

Appeal from judgment entered upon the report of a referee.

The action was brought to recover the amount of two promissory notes made by defendant to renew notes previously made by the firm of Fellows, Holmes & Clapp, on which defendant was an indorser. Robert Fellows, who was a member of said firm, and who made the notes in its name, testified that the loan from plaintiff was procured and the notes made through the agency of one Robert Schell, and gave the details of the transaction as he claimed it to have been, including what was said and done by Robert Schell. Plaintiff, however, testified that the transactions of the loan were had directly between Fellows and herself, and that

Schell had nothing to do with it. Thereupon plaintiff's counsel moved to strike out the testimony of Fellows as to conversations between him and Schell on the ground that defendant had failed to connect plaintiff therewith, and as improper and incompetent, which motion was granted by the referee before whom the action was tried.

*Enoch L. Fancher*, for applt.

*John Delahunty*, for respt.

*Held*, Error; that upon the evidence a question of fact was raised as to whether plaintiff or Fellows correctly stated the manner in which the contract was made, and it was not a proper mode of determining that question to accept the statements of plaintiff as true and strike out the portions of Fellows' evidence relating to conversations with Schell. That he should have denied the motion and ultimately determined the question in deciding the case as to which of these witnesses had given the correct version of the transaction. That if he found that Fellows was correct, then the evidence stricken out would have been admissible as *res gestæ*. That if he found, on the other hand, that plaintiff was correct, he would necessarily reject the evidence of Fellows. That it was material that until it came to the point where such a determination must be given, the evidence should remain in the case for his consideration, and that by striking it out at the time and in the manner he did he committed an error for which the judg-

ment should be reversed and a new trial ordered.

Ordered accordingly.

Opinion by *Davis, P. J.*; *Daniels* and *Haight, JJ.*, concur.

## PRACTICE. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Pratt Man'g Co., *respt.*, v. The Jordan Iron & Chemical Co., *applt.*

Decided May 29, 1884.

An answer which does not deny any of the material allegations of the complaint nor that the defendant has knowledge or information sufficient to form a belief of either of the allegations contained in the complaint should be stricken out on motion for that purpose.

Appeal from judgment recovered on an order striking out the defendant's answer.

The answer of the defendant which was stricken out was in the following form:

The defendant, answering the complaint of the plaintiff, upon information and belief, alleges:

*First.*—That it admits that both plaintiff and defendant are domestic corporations.

*Second.*—It denies each and every other allegation in said complaint contained.

Wherefore, the defendant demands judgment that the complaint be dismissed with costs.

*Dill & Chandler*, for applt.

*Charles H. Knox*, for respt.

*Held*, That the answer was not framed nor made in compliance with the requirements of § 500 of

the Code. The defendant, by its answer, did not deny that it had knowledge or information sufficient to form a belief of either of the allegations in the complaint, nor did it deny in direct terms either of such allegations. The allegations of the complaint uncontroverted are to be taken as true. Code, § 5227.

No issue was created in the case and the court was right in striking out the answer, 38 N. Y. Superior Ct., 423; 62 N. Y., 651, and as no merits have been sworn to, no leave to serve a further answer to the complaint can be directed.

Judgment and order affirmed, with costs and disbursements, but without prejudice to a motion on the merits for leave to serve an answer.

Opinion by *Daniels, J.; Davis, P. J.*, and *Brady, J.*, concur.

## BANKRUPTCY. BAR.

### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jonah D. Decker, *respt.*, v. James Kitchen, *applt.*

Decided May, 1884.

The words "I owe you a claim. I shall pay it every dollar I owe you. I am under great moral obligations to you and I shall pay it," are sufficient to revive a debtor's liability to pay a debt which had been barred by his discharge in bankruptcy.

Appeal from judgment upon verdict at Circuit, and also from order of Special Term denying motion for new trial.

Action to recover the balance of an account, owed by James

Kitchen & Co., of which firm defendant was a member. The only defense is defendant's discharge in bankruptcy. Plaintiff relies for a recovery wholly upon defendant's promise to pay the debt, made since the discharge. Immediately after the certificate of discharge was granted these parties had interviews concerning the debt and plaintiff's ability to collect it from defendant's partner Dorn, against whom suit was begun, resulting in a judgment against Dorn individually. After that, plaintiff testified, in an interview with defendant, he said he did not think Dorn would ever do anything about paying the debt. Plaintiff then asked defendant to give him a note at sixty days, and said he would try to get it discounted; defendant replied that he would, and also remarked, "I will do anything for you, Mr. Decker, that is in my power to do;" he then drew the note, payable to plaintiff's order, thereupon remarking, "I think I can get this note discounted at the First National Bank of New York City, for you. I do some business in that bank," and he applied to that and several other banks, to procure a discount, and failed, and the note remained in his hands. Subsequently this suit was begun, and on the same day, in the presence of the person who served the papers, and of plaintiff's attorney, defendant said to plaintiff, holding the paper which had been served in his hand, "What is this, Mr. Decker?" Plaintiff replied, "It is a notice to pay upon

that judgment I got against Dorn;" defendant said, "What is the use of that? I owe you a claim; I shall pay it, every dollar I owe you; I am under greater moral obligations to you than any man I owe a cent to, and I shall pay it." On the same day, at another place, defendant said, "Mr. Decker, it is unnecessary for you to have served this paper upon me; you have always treated me with the utmost kindness and courtesy and I will never forget your friendship or your kindness. I have got rid of that Nathan claim. I have gone through bankruptcy and I never intended to harm you. I never intended to injure you or repudiate my obligation to you." Defendant denied that he ever promised to pay the original debt.

*Theodore Bacon*, for applt.

*Jonah D. Decker*, resp't. in person.

*Held*, That the evidence of a sufficient promise to sustain the recovery is found in plaintiff's evidence. Defendant's words may be construed as being used in the present tense, implying a special promise and not based on any condition, and this is enough. 7 Gray, 460; 7 Cush., 462; 18 Wall., U. S., 1; 53 N. Y., 521.

That the promise was made after commencement of suit does not prevent a recovery. \* 2 T. R., 760; 4 East, 604; 2 Burr., 1099; 2 B. & C., 826; 2 N. H., 53. Moreover, courts do not, in general, regard the fractions of a day, except to guard against injustice, and the service of the papers and

the conversations may be regarded as contemporaneous acts. 4 Comst., 418; 3 Denio, 263; 3 Cow., 19.

All irregularities in bringing defendant into court were waived by him by his answer and going to trial on the issue presented. 26 Hun, 173.

Judgment and order affirmed, with costs.

Opinion by *Barker, J.*; *Smith, P. J.*, and *Hardin J.*, concur.

## DEED. CONDITION SUBSEQUENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jane B. Wheeler, *resp't.*, v. Henry S. Dunning et al., *applts.*

Decided May, 1884.

A condition subsequent in a deed may be excused when its performance becomes impossible by the act of the party for whose benefit it is created, or it may be waived by the one who has a right to enforce it.

Appeal from judgment on referee's report.

In 1864, one D. and wife conveyed to defendant, The Cayuga County Agricultural & Horticultural Society, certain premises, by deed containing the following conditions: First, that the grantee should not sell any separate part of said land; second, that the grantee should not sell said land without first offering it to the grantor, his heirs or assigns, at the same price that any one else offered; and third, that the grantee should maintain a fence around the premises. In 1868, the grantee executed to the grantor a mort-

gage on the whole of said premises, containing a power of sale of the entire premises, and not containing any of the conditions expressed in said deed. The mortgage was transferred by mesne assignments from D. to plaintiff, and this action is to foreclose the same, default having been made whereby the power of sale has become operative. The S. C. Railroad Co. is made defendant because it occupies a portion of said premises under a lease from the Agricultural Society, granted after the portion so occupied had been condemned to the use of the railroad in proceedings in which D. participated so far as to petition for a change of route to the one now occupied by the railroad. D. died in 1871, and defendants Dunning are his heirs and devisees. The referee held that the grantee was excused from performing the first and third conditions of the deed; and by way of enforcing the second condition, he directed that upon the sale under his decree an opportunity be offered to the grantor's heirs to take the premises at the highest bid made for the same.

*S. E. Payne*, for Dunnings, appls.

*F. F. Taber*, for S. C. RR. Co., deft. and respt.

*J. D. Teller*, for plff. and respt.

*Held*, That the conditions in the deed are conditions subsequent. A condition of that nature may be excused when its performance becomes impossible by the act of the party for whose benefit it is created, or it may be waived by the one who has a right to enforce it.

In the former case the condition is discharged altogether, and the estate made absolute; in the latter, the estate is relieved from the consequence of a breach thereof. 2 Washb. Real Prop., 15, § 18.

The acceptance by the grantor of the mortgage and his assignment of the same to a purchaser for value were a waiver of performance of the conditions in the deed in case of default in the condition of the mortgage and the consequent exercise of the power of sale therein contained.

Appellants have no rights by virtue of the conditions in the deed superior to the lien of plaintiffs' mortgage.

The referee erred in directing that appellants should have opportunity to purchase at the highest bid; but as respondents, who alone are prejudiced by that ruling, have not appealed, we are not asked to reverse it.

Decree affirmed, with costs to respondents to be paid by appellants.

Opinion by *Smith, P. J.*; *Har- din, J.* concurs. *Barker, J.*, takes no part.

## APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *respts.*, v. Henry H. Norton, *applt.*

Decided June, 1884.

No appeal lies to the Court of Sessions from a judgment of a Court of Special Sessions charging the prosecutor in a criminal proceeding with costs of the prosecution.



Appeal from an order of the Court of Sessions dismissing an appeal from a judgment of a Court of Special Sessions, charging appellant with the costs of a criminal prosecution in the last mentioned court, in which said appellant was the prosecutor.

The judgment of Special Sessions was rendered under §§ 719 and 720 of the Code of Criminal Procedure, and the only question is whether an appeal will lie from such judgment to the Court of Sessions.

*H. D. Tucker*, for applt.

*J. R. Strang*, Dist.-Atty, for respts.

*Held*, If the right of appeal exists it must be found in § 749 of said Code. The judgment of the Special Sessions is not a judgment "upon conviction" within the meaning of § 749. A "judgment upon conviction," as the words are used in the Code of Criminal Procedure, can only be rendered against a person charged with the commission of a criminal offense or the defendant in a criminal prosecution. It is absurd to say that appellant was convicted of a crime.

Order affirmed, but as the question is new, without costs.

Opinion by *Smith, P. J.*; *Barker, Haight* and *Bradley, JJ.*, concur.

#### JUDGMENT. SET-OFF. ASSIGNMENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jacob I. Beck, *respt.*, v. Edward

Kibble, *applt.*; Same v. Same; and Kibble v. Beck.

Decided May, 1884.

B. procured a County Court order offsetting two judgments in his favor and against K. against K.'s judgment against him; before either judgment was entered, K. had assigned all his interest in the costs in the action, which he ultimately won, to W. On appeal by K. alone from that order, *Held*, That the order must be affirmed.

Appeal from County Court order offsetting judgments in Beck's favor against Kibble, in actions number two and three, against Kibble's judgment in the first action. All of the actions were begun in justice's courts, and appeals were taken to County Court, judgment being entered in each case before this motion. Executions on the judgments against Kibble had been returned unsatisfied. An execution on the judgment in Kibble's favor was in the sheriff's hands. Kibble is insolvent. Beck has property to satisfy the judgment against him. In County Court Kibble appeared in person, but one W. in fact conducted the actions in justice's courts and on appeal, at Kibble's request, although he was not then an attorney at law. After the appeals were taken in County Court, and before judgments were entered in either action, Kibble assigned all his interest in all costs which he might recover in the first action to W. Motion papers were served on Kibble and W. Both appeared and opposed the motion. From the order Kibble alone appeals.

*E. O. Worden*, for applt.

*H. S. Bedell*, for respt.

*Held*, That W.'s services were good consideration for the transfer of prospective costs. That W. was not an attorney has nothing to do with the question.

W. had good title, free from the right of set-off, against the judgments in Beck's favor. 53 N. Y., 243. But that question need not be pursued, for Kibble alone appeals, and no injustice has been done him, and W. acquiesces in the directions of the court below.

Order affirmed, with \$10 costs.

Opinion by *Barker, J.*; *Smith, P. J.*, and *Hardin, J.*, concur.

#### PLEADING. MORTGAGE. FORECLOSURE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Alfred Krower et al., exrs., v.  
Wm. H. Reynolds.

Decided May, 1884.

An objection that may be raised by answer in the nature of a plea in abatement is waived by not being so raised.

Where one has not been made a party to a foreclosure suit none of his rights are affected thereby.

Motion by defendant for new trial on exceptions taken at Circuit, and ordered heard at General Term in first instance.

The complaint alleged that by the terms of a deed conveying certain lands in New Jersey to defendant he assumed to pay a certain mortgage thereon held by plaintiff's testator as collateral security for payment of a certain bond. The complaint also alleged that a judgment had been recovered

in New Jersey by said testator against defendant upon the liability created by said deed. The answer admitted execution of the bond and mortgage, and of the deed, and that the latter contained a clause "which has been claimed by interested parties to make defendant personally liable for the mortgage debt," but denied any knowledge or information sufficient to form a belief as to whether such clause was sufficient to create such liability. The answer denied that defendant was ever served with process in the suit in which the judgment set out in the complaint was obtained, and that the court which rendered said judgment ever acquired jurisdiction of his person. At the trial plaintiffs proved their letters testamentary, and rested. Defendant moved for nonsuit, which was denied.

*J. & Q. Van Voorhis*, for deft.

*Satterlee & Yeomans*, for plffs.

*Held*, No error; the complaint alleged facts constituting a cause of action growing out of the agreement in the deed, and those facts were not denied in the answer.

Having denied the validity of the judgment, defendant could not be heard to assert that the complaint showed that his liability upon the agreement was merged in the judgment. Nor could he object that the suit was brought without leave of the court after an action to foreclose the mortgage, because such objection may be raised by answer in the nature of a plea in abatement, 84 N. Y.,

105, per Andrews, *J.*, 107, and not being so raised is waived.

Defendant contends that the mortgage being unforclosed as to him, the testator and his executors are to be treated as a mortgagee in possession, and are accountable for rents and profits in reduction of the mortgage debt. If that is so, it does not entitle defendant to dismissal of the complaint, there being no proof of any amount of rents and profits applicable to payment of the debt.

The mortgage being yet unforclosed as to defendant, if he pays it all the equities which such payment would have conferred on him at any time will exist in full force.

Motion denied, and judgment ordered for plaintiff on the verdict.

Opinion by *Smith, P. J.*: *Hardin, J.*, concurs; *Barker, J.*, not voting.

#### ASSAULT. INDICTMENT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

The People, *respts.*, v. Theron  
Whedon, *applt.*

Decided May, 1884.

A pistol is a fire-arm, and the act of discharging a loaded pistol "at, towards and against" another, with intent to kill him, is an offense within § 217 of the Penal Code.

The exclusion of testimony offered to show that the prisoner was insane "some months" before the shooting, *Held*, Error.

Appeal from judgment of Court of Sessions on conviction of defendant upon indictment for as-

sault in the first degree. The appeal also brings up for review the judgment and order of said court overruling defendant's demurrer to the indictment; also an order denying motion in arrest of judgment, and order denying motion for new trial on the minutes.

The indictment charges that defendant, with force and arms, feloniously made an assault upon John Cross, and "to, at, towards and against him, the said John Cross, a certain pistol, then and there loaded and charged with gunpowder and lead, which he the said Theron Whedon in his hand then and there had and held, the same being then and there likely to produce death, willfully and feloniously did, then and there, shoot off and discharge with intent, him, the said John Cross, then and there feloniously and willfully to kill," etc.

*M. M. Waters*, for *applt.*

*Ceylon H. Lewis*, Dist.-Atty, for *respts.*

*Held*, That the averments constitute an offense as defined by § 217 of the Penal Code. It is not necessary that the pleader should use the very words of the statute. Penal Code, § 11. The demurrer was properly overruled.

The demurrer having been overruled, defendant pleaded not guilty and added specifications of insanity. A witness for defendant testified that the prisoner had worked for him some months before the shooting. He was asked whether he observed anything peculiar in regard to his conduct,

and replied, "Yes, I discovered something different from what I expected." Defendant's counsel then offered to prove acts and conduct of defendant while in witness' employ, for the purpose of showing his insanity. This was objected to as incompetent and improper, and the evidence was excluded. Evidence had been given that defendant had been dwelling upon supposed insults and indignities by Cross to defendant's female relatives, had been subject to fits of weeping without apparent cause, and had been restless nights, and on the occasion of the shooting his eyes were wild and staring, his face purple, his manner excited and violent, and there was evidence that he had a nervous temperament. A physician, in answer to the District Attorney's hypothetical question, had answered that he should say the circumstances would be sufficient to unsettle such a mind.

*Held*, That the testimony was not incompetent or improper, unless too remote. Under the circumstances it was not too remote, and its exclusion was erroneous.

Judgment and order upon the demurrer, and order upon motion in arrest, affirmed, and conviction and judgment thereon, and order denying new trial reversed, and new trial ordered in Court of Sessions.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## RECEIVERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Attorney General v. The Continental Life Insurance Co.  
*In re* claim of Wingate & Cullen.

Decided May 29, 1884.

A claim against the assets of an insolvent insurance company for disbursements and legal services rendered to a receiver of said company who died before the taking effect of Chap. 378 of the Laws of 1878 is not required by said act to be presented to, and considered, and passed upon by the General Term in the first instance. The laws and practice in force prior to the passage of said act apply to such a claim, and its payment can be properly ordered by the Special Term.

Appeal by the receiver from an order of Special Term, directing payment to Messrs. Wingate & Cullen of the sum of \$1,500 in part payment for legal services and disbursements performed and made for John P. O'Neil, a former receiver of the defendant, who died on Feb. 22, 1883. The justice of the order was not questioned, but it was claimed by the appellant that the Special Term had no power to make it, and that, under § 4 of Chap. 378, Laws of 1883, the order for the payment of said sum could only be made by the General Term after an account of the items included in it should first be presented to that tribunal properly authenticated and verified.

*Edward H. Hobbs* and *John C. Keeler*, for applt.

*Geo. W. Wingate*, for resp't.

*Held*, That as O'Neil died, and his receivership was terminated, and the claim had fully matured

before the passage of this act, neither the fourth section, nor any other provision contained in it, required this claim to be considered and passed upon by the General Term before it could lawfully be paid. That a receiver has not been required by said act to insert in the account ordered to be made any statement whatever of the receipts and expenses of a preceding deceased receiver. Such account is only required from the receiver who has himself administered the affairs of the trust during the preceding six months, and the prohibition forbidding payment of any legal fees, &c., until approval by the General Term applies only to such receiver, and contemplates only expenses incurred by him in the course of his management of the affairs of the trust. That the affairs of a preceding deceased receiver were not intended to be included within this statute, and they continued to be controlled by the laws and practice previously in force, and, under their authority, the application for the payment of this claim was properly made to the Special Term.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

#### WILLS. WITNESSES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

J. Wesley Whitfield et al.,  
*appls.*, v. Elizabeth G. Whitfield  
et al., *respts.*

Decided May, 1884.

The mere lack of recollection of one subscribing witness as to material points does not impair the force of affirmative evidence as to the same points furnished by the other subscribing witness and the attestation clause.

The statute does not confine the proponent of a will to the testimony of the subscribing witnesses, nor compel him to examine them as to testator's testamentary capacity.

Appeal from Surrogate's decree admitting to probate the will of John Whitfield, deceased.

The will was prepared by the Rev. Zenas Hurd, pastor of the M. E. Church of which deceased had long been a member, and was witnessed by Mr. Hurd and Dr. Hewitt, the physician who attended deceased in his last illness. The will purports to have been subscribed at the end by the testator by making his mark, and the recitals of the attestation clause, signed by the witnesses, import that all the requirements of the statute were complied with. Mr. Hurd gave testimony according to which the execution was complete. Dr. Hewitt's testimony concurred with Mr. Hurd's, except that he did not recollect that deceased said anything as to the paper being his will, or that he requested the witnesses to sign it. Proponents examined Mr. Hurd as to the testamentary capacity of deceased, but did not examine Dr. Hewitt, which omission was interposed by contestants as an objection to receiving the will in evidence, and as the ground of a motion to dismiss the proceedings and refuse probate. Subsequently, contestants examined

Hewitt on that subject, and he testified that in his opinion testator was not of sound and disposing mind and memory at the time when he executed the will.

*Ransom & Joyce*, for appls.

*George C. Greene* and *Henry A. Childs*, for different respts.

*Held*, That the due execution of the will was satisfactorily established.

The statutory requirement that the witnesses to the will shall be examined does not confine the proponent to the testimony of those witnesses, nor compel him to examine them as to the testamentary capacity of the testator. 2 R. S., 58, § 14, Laws of 1837, Ch. 460, §§ 10, 17; Code of Civ. Pro., § 2618; 1 Barb., 526, and cases cited by Hand, J., p. 533. Even if the subscribing witnesses have forgotten the occurrence, or testify against the execution of the will, the proponent is not concluded thereby. Code of Civ. Pro., § 2620. Where the proponent omits to examine a subscribing witness as to a material fact, the contestant has no cause of complaint if the witness is produced so that he can examine him, as was done in this case.

Decree affirmed, with costs.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## REMOVAL.

### N. Y. COURT OF APPEALS.

The People ex rel. Dumahant, applt., v. The Board of Fire Comrs., respt.

Decided June 27, 1884.

Relator, who was chief clerk in the Bureau of Inspector of Buildings, gave verbal permission to one H., during the absence of the inspector, to proceed with the work of making an addition to a frame building pending the approval of the inspector. Immediately thereafter he sent an examiner who found that the work was begun and that the description in the application was inaccurate, whereupon the permission was revoked. The inspector subsequently approved the plans on condition that the premises be made to conform to the description in the application. Relator had authority in the absence of the inspector to give such verbal permission, but was not instructed to dispense with a preliminary examination. He was removed on charge of having given such permission before an examination and before the plans had been approved by the inspector. *Held*, That there was no substantial ground for his removal.

This was a certiorari to review the action of the Board of Fire Commissioners in removing the relator from a clerkship in the Fire Department, the removal having been made because of the alleged official misconduct of the relator. It appeared that the relator was chief clerk in the Bureau of Inspector of Buildings in the Fire Department. In July, 1883, while the inspector, the relator's immediate superior, was away on his summer vacation, one H. came to the office for permission to make an addition to a frame building near the depot at Fordham, consisting of a mansard roof seven feet six inches high, four feet six inches wide, and from thirty-one to thirty-three feet deep. The building in question was occupied as a real estate office, and it was intended by the addition to increase its height from ten

to about eighteen feet. The power to grant the permission requested was vested by law in the inspector only. To avoid delays to citizens he had instructed the relator, if any applications were made during his absence for a permit to make any erection or alteration which appeared to be in accordance with the law, he might give verbal permission to proceed with the work pending the formal approval of the inspector. The relator required H. to reduce his application to writing as required by law. This having been done and the application filed, and the relator seeing that the proposed construction as described in the application was in conformity to law, on July 10th he told H. he might proceed with the work, if the building was constructed as stated in the application. Nothing appears to have been said about a preliminary examination of the building. Immediately after giving the verbal permission the relator sent an examiner to the premises. The examination was made on July 11th, when it was found that H. had begun the work. It was also found that the description in the application presented to the relator was inaccurate, and he thereupon revoked the verbal permission given and served on H. a notice in writing to that effect. On July 14th the inspector approved the plans on condition that the premises should be made to conform to the description in the application made to the relator. A complaint was made against H. for violation of the building laws, which was dis-

missed. The grounds of the removal of the relator, specified in the resolution removing him, were that he gave H. permission to proceed with the proposed alteration before the building had been examined and the specifications and plans approved by the inspector. On cross-examination the inspector testified that he did not instruct the relator to dispense with the preliminary examination of the building before giving permission to make the alteration.

*Robert S. Green*, for applt.

*Wm. L. Findley*, for resp't.

*Held*, That the conduct of the relator in the matter was fully explained and justified, and there was such an absence of substantial ground for his removal as required the court below to reverse the proceedings of the board.

Judgment of General Term and the proceedings of the board removing the relator reversed.

Opinion by *Rapallo, J.* All concur.

#### ASSIGNMENT FOR CREDITORS.

##### N. Y. COURT OF APPEALS.

Warner, assignee, *applt.*, v. Jaffray et al., *respts.*

Decided June 10, 1884.

An assignment for the benefit of creditors takes effect from the time of its delivery, but has no greater effect as to passing title than any other conveyance, and does not operate on the creditors without their consent.

The rule that the voluntary transfer of personal property is to be governed everywhere by the owner's domicil yields whenever it is necessary for the purposes of justice that

the actual situs of the thing should be examined, and where the law and policy of the State where the property is located prescribe a different rule of transfer.

The law of Pennsylvania provided for the recording of assignments by nonresidents to take effect from their date, provided that no *bona fide* creditor having a lien before the record without actual notice of the assignment should be effected. After the assignment was delivered in this State, but before it was recorded in Pennsylvania, defendants attached property of the assignor in that State. *Held*, That the title to the property in that State did not pass to the assignee before the attachment.

Affirming S. C., 18 W. Dig., 47.

On March 1, 1881, at J., in this State, W., a resident of that place, made an assignment to plaintiff for the benefit of his creditors. The assignment was acknowledged, delivered to and accepted by the assignee at 2 P. M. on that day, but it was not recorded in the clerk's office until 8 A. M. the next day. W., at the time he executed the assignment, owned a large amount of personal property situated at his place of residence, and also in Crawford and Warren counties, Pennsylvania. The assignment was recorded in Crawford county March 18th, and in Warren county March 19th. Defendants resided in the city of New York, and were creditors of W. On March 1, 1881, after the execution and delivery of the assignment, they commenced actions against W. in Crawford and Warren counties, and in each of those counties process of foreign attachment was issued, and by virtue thereof, in the afternoon of March 1st, the property of W. in said counties was attached, defendants at the time of

the service of the attachments having no actual notice of the assignment made by W. Plaintiff, having first demanded possession of the property attached, commenced this action to restrain defendants from further proceeding under the attachments. At the time the assignment was made a statute of Pennsylvania provided that assignments by nonresidents for the benefit of creditors should be recorded in any county where the property of the assignor might be, and take effect from its date, provided "no *bona fide* purchaser, mortgagee or creditor, having a lien thereon before the recording in the same county, and not having previous actual notice thereof, shall be affected or prejudiced."

*Everett P. Wheeler*, for applt.

*William Allen Butler*, for respts.

*Held*, That the assignment took effect from the time of its delivery, Laws 1877, Ch. 466, as amended by Ch. 318, Laws 1878; 57 N. Y., 641; 1 Abb. N. C., 47; 71 N. Y., 502, but it being a mere voluntary conveyance could have no greater effect, so far as passing title to the assigned property, than any other conveyance, and did not operate upon the creditors of the assignor, or place them under any obligations without their consent, and any one of them could, notwithstanding the assignment, enforce his claim against any property of the assignor not conveyed by the assignment without violating any rights or equities of other creditors.

*Also held*, That the title to the



property of the assignor in Pennsylvania did not pass to the assignee under the assignment before it was attached by defendants. The rule that the voluntary transfer of personal property is to be governed everywhere by the owner's domicile yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined, and when the law and policy of the State where the property is located prescribe a different rule of transfer from that of the State where the owner lives. 23 N. Y., 225; 88 id., 576; 35 id., 657; 54 id., 29; 81 id., 199; 84 id., 367; 7 Wall., 139; 93 U. S., 664.

*Bagley v. A. M. & C. RR. Co.*, 86 Penn. St., 291, distinguished.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur.

## TAXES. TRESPASS.

### N. Y. COURT OF APPEALS.

*Woolsey, applt., v. Morris et al., respls.*

Decided June 17, 1884.

The identity of the person named in a warrant for the collection of a tax may be shown by parol evidence, and that fact being shown justifies the officer in seizing his property for its payment.

A ministerial officer is protected in the execution of process, regular on its face, issued by a court, officer or body having general jurisdiction of the subject matter, or jurisdiction to issue it under special circumstances, although in fact jurisdiction did not exist in that particular case.

The bare levy by an officer under several pro-

cesses at the same time, some of which are valid and others invalid, will not constitute him a trespasser, although the invalidity of the invalid ones was known to him or appeared on their face.

Affirming S. C., 18 W. Dig., 492.

This action was brought to recover damages for an unlawful seizure of plaintiff's chattels under eight warrants for the collection of certain taxes assessed against "E. J. Woolsey," issued by the Common Council of Long Island City, and directed to defendant, John R. Morris, as receiver of taxes for said city. The Common Council was empowered by law to issue warrants for the collection of taxes to the receiver of taxes. Laws 1871, Chap. 461, §§ 12, 13, 14. The latter was vested with the powers of town collectors, and defendant Wm. H. Morris was his legally constituted deputy. *Id.* Plaintiff claims that warrants for the seizure of the property of E. J. Woolsey did not authorize the seizure of the property of Edward J. Woolsey, the plaintiff, and that the taxes in three of the warrants had been paid by plaintiff to the receiver before said warrants were issued, and that as to the five others the taxes therein were upon property which the plaintiff had never owned or occupied and were illegal and void. The evidence showed that plaintiff owned the land on account of which the taxes in three of the warrants were levied, and that he paid these taxes; that the property on account of which the taxes in the five other warrants were levied was owned by Emily

P. Woolsey, but her relation (if any) to the plaintiff did not appear. The plaintiff had resided in Long Island City for many years, and no other person by the name of E. J. Woolsey was shown to have resided there, and plaintiff gave no evidence leading to any other inference. The property, though formally for a time put into the hands of a lessee, was practically left in the possession of plaintiff, and the levy was subsequently abandoned.

*Frank E. Blackwell*, for applt.

*J. Ralph Burnett* and *Chas. Benner*, for respts.

*Held*, That plaintiff was not entitled to recover; that the evidence presumptively established that plaintiff was the person intended by the designation in the warrants; that such fact could be shown by parol evidence, and the identity being shown the officer was justified in seizing his property for the payment of the tax. 2 N. Y., 476; 13 Wend., 35; 4 Wash., 718. A ministerial officer is protected in the execution of process, regular on its face, issued by a court, officer or body having general jurisdiction of the subject matter, or jurisdiction to issue it under special circumstances, although in fact jurisdiction of the person or subject matter did not exist in the particular case. 5 Wend., 170; 16 id., 562; 1 Den., 141; 5 N. Y., 376. The tax receiver was not bound to inquire whether the taxes were legally assessed. He was justified by the command of the warrants in proceeding to issue his warrants for the collection of the

taxes specified in the tax rolls, in case of their non-payment after due notice. 24 Wend., 486; 5 Hill, 440. As between the parties, the seizure under the five warrants was not a trespass on the part of defendants, and they did not lose their protection because the seizure was also made under three other warrants for taxes which had been paid to the receiver.

When an officer having several processes in his hands, some valid and some invalid, levies under all of them upon the personal property of the party against whom they are issued, the bare levy does not constitute him a trespasser, although the invalidity of the invalid processes were known to him or appeared on their face. A different question would be presented if, after a satisfaction of the valid process, the defendants should claim to hold or sell the property under the others. 2 N. Y., 451.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Andrews, J.* All concur.

## REMOVAL. FIREMEN.

### N. Y. COURT OF APPEALS.

*Riley, applt.*, v. The Mayor, &c., of N. Y., *respt.*

Decided June 17, 1884.

Plaintiff was appointed assistant engineer in the Fire Department of N. Y., but was at times, by order of the Commissioners, assigned to duty as a machinist, during which he received a smaller salary, for which he

receipted in full without objection. *Held*, That such transfer did not constitute a removal within § 77, Chap. 335, Laws of 1873, and that plaintiff's action amounted to a waiver of any right to claim compensation as assistant engineer.

It is competent for the Commissioners, with the acquiescence of the person employed, to assign him to the performance of other duties in the general course of his employment, although they differ in some respects from those usually discharged by him, and it is competent for them to change the rate of compensation to be paid to any assistant engineer.

The rule that when a fixed salary or compensation for services is provided by law, or the right to fix such compensation is given to one class of persons, it is not competent for another officer, whose duty it is to engage persons to perform the services, to stipulate for a smaller rate than that established, does not apply when the persons authorized to effect the employment are also empowered to fix the compensation.

Affirming S. C., 15 W. Dig., 271.

On May 20, 1875, plaintiff was appointed to duty as an assistant engineer in the Fire Department of the City of New York, and has since that date been continuously employed in said department. From time to time during such employment plaintiff, by order of the Fire Commissioners, has been alternated between the duties of an assistant engineer and those of a machinist in the repair shop; and while employed as assistant engineer has been paid for his services at the rate of \$1,250 per annum, and signed the monthly pay-roll, receipting for his wages in full at that rate; and while performing the duties of a machinist receipted in full for his wages in a similar manner at the rate of \$3 per day. This appears to have been done without objec-

tion. In November, 1881, he brought this action to recover the difference in such wages for the period of time he performed services as machinist alone.

*Charles P. Miller*, for applt.

*D. J. Dean*, for respt.

*Held*, Plaintiff could not maintain this action; that his transfer by the Fire Commissioners, in the exercise of their supervisory authority over the administration of the department, from one class of duties to another, which he was equally capable of performing, did not constitute a removal within the meaning of § 77 of Chap. 335 of the Laws of 1873, prohibiting the removal of officers and members of the uniformed force except after charges have been preferred and publicly examined into, and after notice to the person charged.

*Also held*, That it was entirely competent for the Commissioners, with the acquiescence or assent of the person employed, to assign him to the performance of other duties in the general course of his employment, although they might differ in some respect from those usually discharged by assistant engineers. The duties discharged by every employee of the department are by the statute left entirely to the discretion of the Fire Commissioners. It is entirely competent for them to change the rate of compensation to be paid any assistant engineer, and upon assigning him to duty less profitable to the department to compensate him accordingly.

A conversation of the President of the Board of Fire Commis-

sioners, in which he stated the reasons actuating the board in assigning plaintiff to duty as a machinist, was received in evidence under objection.

*Held*, Error. That it was not competent for the president to state the motives that actuated the other members of the board in the performance of an official act.

*Also held*, That plaintiff's actions amounted to a waiver of any right to claim the compensation attached to the position of assistant engineer. The evidence raises a strong presumption that plaintiff contracted with the Commissioners to labor as a machinist while so employed at \$3 per day. 8 Hun, 443.

A receipt is always *prima facie* evidence of the facts and statements contained therein, and, in the absence of a sufficient explanation showing its incorrectness, becomes conclusive evidence against the party executing it.

The rule that when a fixed salary or compensation is provided by law to be paid for services rendered by an individual to the public, or the right to fix such compensation is given to one class of persons, it is not competent for another officer, whose duty it is to engage persons to perform the services, to stipulate with them for a smaller rate than that provided by established regulations, 75 N. Y., 38; 93 id., 291; 91 id., 265, is not applicable when the persons authorized to effect the employment are also empowered to fix the salary or compensation of the employee.

Vol. 19—No. 17a.

Judgment of General Term, affirming judgment for the defendant directed by the Court, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

## CONSTITUTIONAL LAW. ELECTIONS.

### N. Y. COURT OF APPEALS.

The People ex rel. Augerstein et al., *appls.*, v. Kenney et al., *respt.*

Decided June 17, 1884.

A question as to the constitutionality of a law should not be decided in any case unless it is properly presented and necessarily involved. Voters can waive their constitutional right to vote for all the officers to be elected and their ballots be valid.

This action was brought by the Attorney-General in the name of the People, on behalf of the relators, to test the title of the defendants respectively to the office of Alderman for the city of New York. Chapter 335 of the Laws of 1873 is an act entitled "An act to organize the local government of the city of New York." By section 4 of said act, as amended by chapter 400 of the Laws of 1878, it is provided that the then Board of Aldermen of the city of New York should continue in office until the first Monday in January, 1879, that being the date when the term for which they were elected ended; that twenty-two Aldermen should be elected at the general State election in 1878, three in each senatorial district, as such districts existed on

January 1, 1878. It was also provided that they should be residents of the district in which they were elected, and that no voter should vote for more than two of said Aldermen. It was also provided that six Aldermen-at-Large should be elected, to be voted for on a separate ballot, "but no voter shall be allowed to vote for more than four of the said Aldermen-at-Large. \* \* \*" The members of the Board of Aldermen to hold office for one year and to enter upon their duties at noon on the first Monday in January after their election. A full board to be elected annually at the general election as above provided. By section 119 of said act of 1873, Chapter 137 of Laws of 1870, and Chapter 574 of Laws of 1871, providing that the Board of Aldermen of the city of New York should consist of fifteen members, to be elected on a general ticket from the city at large, at the general election in November, and hold office for two years, was repealed. The relators claimed that § 4 of the Act of 1873, as amended, was unconstitutional and void, because all the voters were not permitted to vote for all the Aldermen to be elected, Const., Art. 2, § 1, and should be treated as if it had never been enacted, and that hence the Act of 1870, as amended in 1871, was still operative, and they having been candidates for the office of Alderman in November, 1880, and receiving each about 1,000 votes, which were all the votes cast for Aldermen-at-Large under that act, were duly elected

to that office for two years from January 1, 1881. At the same election defendants K. and others were elected Aldermen under § 4 of the Act of 1873, as amended, and received a large majority of the votes cast under that act, each one receiving many more votes than the relators, and they were declared elected and on the first Monday of January, 1880, entered upon the discharge of their duties and organized as a Board of Aldermen. This action was commenced in 1881, and put at issue by proper denials, but did not come to trial that year. In the fall of 1881 the defendants B. and others were chosen Aldermen under the Act of 1873, and entered upon the discharge of their duties and organized the Board on the first Monday of January, 1882. They were, upon application of the relators, made defendants and the complaint amended so as to include them. The action was tried in 1882 and it was decided that B. and his associates were entitled to possession of the offices of Aldermen, and the complaint was dismissed. Since the election of B. and his associates two successive Boards of Aldermen have been elected under Chapter 403 of the Laws of 1882, which abolished the minority system complained of. The offices are now held by Aldermen thus elected in the fall of 1883.

*Wilson S. Wolf*, for applts.

*D. J. Dean*, for respts.

*Held*, That the relators not now being entitled to the offices of

Aldermen, and if defendants intruded into the offices they being no longer intruders, the constitutional question raised need not be decided. A question so grave and interesting should not be decided in any case, unless it is properly presented and necessarily involved.

If Section 4 of the Act of 1873, as amended, was constitutional then defendants were legally elected. If the provision limiting the right to vote to two of the three Aldermen and to four of the six Aldermen-at-Large is unconstitutional, that portion of the section could be disregarded, as the section would furnish a complete and harmonious system with those limitations left out, Cooley on Const. Liens, 178; 46 N. Y., 57; 50 id., 553; 23 Pick., 362; 4 Ind., 342; 4 Scam. (Ill.). 461; 32 Md., 369, hence defendants could have been elected under the Act of 1873.

It did not appear that any voter was denied the right to vote for all the six Aldermen in his senatorial district, or for all the three Aldermen-at-Large.

*Held*, That the voter could waive the constitutional right to vote for all, and his ballot be valid.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur.

## CONTRACT. RESCISSION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

David Johnson, *applt.*, v. Marcus Frew, *respt.*

Decided May, 1884.

The general rule that a party who seeks to disaffirm his contract must restore whatever he has received under it does not hold where the other party has, by absconding, made such restoration impracticable.

Appeal from judgment of County Court, reversing a justice's judgment.

This action was begun in justice's court to recover possession of a harness which G. fraudulently induced plaintiff to sell and deliver to him on credit. G. paid part of the price at the time of the purchase, and some ten days thereafter absconded, and plaintiff with one Q., a constable, found the harness boxed up with other things at the railway station, addressed to G. at Chicago. Plaintiff, with Q.'s assistance, took the harness to his shop. Before doing so he procured an attachment from a justice of the peace, upon affidavit alleging that G. was indebted to him for the unpaid part of the price of the harness, which attachment Q. had with him when the harness was taken from the station. Shortly before these proceedings on plaintiff's part, H., another constable, had levied on the box and its contents under an execution issued upon a judgment against G. in favor of one R.; and after the taking by plaintiff and Q., H. brought replevin for the

harness against Q. and employed Frew to serve the papers, who accordingly took the harness from plaintiff's possession. Thereupon plaintiff brought this action. Plaintiff did not, at any time, restore or offer to restore what he received from G. towards payment for the harness. There is no evidence that when plaintiff took out the attachment any process was issued or a suit commenced. The justice's jury gave a verdict in plaintiff's favor, which the County Court reversed for the reason that plaintiff, not having restored what he had received, could not disaffirm the contract.

*F. S. Smith*, for applt.

*Nash & Lincoln*, for resp't.

*Held*, That plaintiff could not restore the money to the vendee, he having fled to parts unknown. The vendee was the only person entitled to receive the money, and bringing it into court and leaving it there would not be a restoration to him nor would it affect his rights, he not being a party to the suit; nor would it prevent his recovering it from plaintiff in a proper action; nor could the judgment creditor of G. levy on it if it were paid into court, as it would not be the property of G. till he had received it. 19 Barb., 412; 40 id., 220; 41 N. Y., 215. Payment to defendant would not be a restoration of the money, for defendant has no authority to receive the money for G., nor is he subrogated in his place. Plaintiff holds the money for the use of G.

Appellant has not, by attachment proceedings, elected to affirm

the contract. At most, his affidavit and proceedings under the attachment, even if he assumed to take the harness by virtue of it, raised a question of fact as to whether he affirmed the contract. 5 Hill, 183.

Judgment of County Court reversed and that of the justice affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## EXECUTION. REDEMPTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Fanny H. Thomas et al., exrs.  
*respts.*, v. Andrew D. Bogert et al.,  
*appls.*

Decided May 9, 1884.

An attorney who has issued an execution has no right to countermand it after a sale of real property has been made under it but before a certificate of sale has been issued to the purchaser.

A general execution issued on a judgment in an action in which an attachment has been granted is voidable only, and the judgment debtor alone is entitled to take advantage of the defect.

When real property is struck off to a purchaser on an execution sale the sale is complete, and the right of the judgment debtor to redeem springs immediately into existence.

Appeal from judgment of Special Term.

In 1880 Andrew D. Bogert and another commenced an action against Abraham Thomas and another in which an attachment was issued against the property of said Thomas on account of his non-residency and which was levied

upon certain real property belonging to him. Subsequently a judgment was entered in the action against said Thomas and an execution, general in form, was issued upon it, and, under such execution, a sale of the property took place, and it was struck off to Andrew D. Bogert, but before a certificate of sale had been issued to him by the sheriff the attorney issuing the execution countermanded it, and subsequently issued another execution in the form prescribed by the Code for an execution in an action in which an attachment has been issued; and, under this execution, another sale took place at which the property was again bid in by Bogert. In the meantime Abraham Thomas had conveyed the property attached to Mary Thomas, and, after the first sale and before the second, she tendered to the sheriff the purchase price paid by Bogert at the first sale, with interest, and demanded a certificate of redemption of said property, which was refused, and she thereupon brought this action for the purpose of having the second sale adjudged null and void and she declared to have redeemed the premises. The action was resisted upon the ground that the execution under which the sale was made and of which the redemption was predicated was invalid, and, further, that it was countermanded before any certificate of sale was given and therefore before the sale was consummated.

*Ashbel Green* and *George A. Strong*, for applts.

*Hamilton Wallis*, for respts.

*Held*, That at the time of the alleged countermand the execution was *functus officio* and it was not in the power of the attorney to countermand it.

*Jackson v. Anderson*, 4 Wend., 480, criticized.

That the execution, although not in strict conformity to § 1370, Code of Civ. Pro., which requires a special execution to be issued in an action where an attachment has been levied, was nevertheless voidable only and could only be assailed by the judgment debtor. 8 Johns., 361; 13 id., 102; 7 N. Y., 195; 15 W. Dig., 309; 25 Hun, 262; 88 N. Y., 611.

*McKay v. Harrower*, 27 Barb., 463, distinguished.

That when the property was struck off to Bogert on the first sale the sale was complete and the execution was *functus officio*, and the right of the grantee of the judgment debtor to redeem arose at once and was established. *Crocker on Sheriffs*, § 487.

That, therefore, the sale under the first execution was binding upon the plaintiff therein; that the second execution was unauthorized, and that the sheriff was bound to execute the certificate of redemption to plaintiff's testator.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.



## COSTS.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Joseph M. Cook et al., exrs.,  
appls., v. Mary E. Munn et al.,  
respts.

Decided May 9, 1884.

The general rule that in an action to obtain the construction of a will costs will be charged upon the general estate if the will is so drawn as to create doubt and render resort to a court necessary or advisable only relates to a question affecting the administration of the entire estate, and has no application to a case in which a particular share only is involved in doubt.

In an action brought by the executors to ascertain who is entitled to a particular share of an estate, making the persons claiming such share defendants, but to which the other persons interested in the estate are not parties, only the costs of the executors will be paid out of the general estate. The other parties must pay their own costs out of their shares of the estate.

Appeal from order of Special  
Term.

This action was brought by plaintiffs, as executors of Charles S. Munn, to procure an adjudication deciding whether Mary E. Munn, as the widow of Charles Munn, deceased, or as guardian of his infant children, or as his administratrix, was entitled to the legacy left him by the said Charles S. Munn. The said Mary E. Munn, individually, as guardian, and as administratrix, and the said infants were the only parties defendant. The court awarded the fund in dispute to the infants, and directed that the costs and allowances of all parties should be paid out of the general estate. From

the order containing this direction the plaintiff appealed.

*George W. Lyon*, for appls.

*F. G. Fincke*, for Mary E. Munn.

*Alexander T. Goodwin*, for infant defts.

*Held*, That the general rule that in an action to obtain the construction of a will the costs, though in the direction of the court, will be charged upon the general estate if the will is so drawn as to create doubt and render resort to the court necessary or advisable, 4 Johns., 608; 4 Paige, 272; 6 Paige, 271, 287; 9 Paige, 94; 41 N. Y., 507, 515; 70 id., 81; 66 id., 169, only relates to a question affecting the administration of the entire estate, and has no application to a case in which a particular share only is involved in doubt.

That, in this case, there was no dispute affecting the general estate, the only question being to which of the defendants did a certain share of it belong, it making no difference whatever to the other participants of the testator's bounty what was done with that portion, and who were not made parties to the action, there being no necessity that they should be. That there was no reason, therefore, why all the costs and expenses should be paid out of the general estate. That plaintiffs, as the executors, were justified in asking the instruction of the court as to their duties in the payment of the legacy or share given to Charles Munn, and whatever expense was incurred in that proceeding should be paid out of the

general estate, but that the defendants should pay their own costs—the defendant Mary E. Munn, as administratrix, out of any portion of the estate in her hands as administratrix, and the infants out of their share in the legacy.

Ordered accordingly.

Opinion by *Brady, J. ; Davis, P. J.*, and *Daniels, J.*, concur.

### MARRIED WOMEN. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Eleazer A. Williams, respt., v. Joseph Burton et al., impld., appls.*

Decided April, 1884.

A married woman who embarks in business as a member of a firm is liable upon the firm notes given for money to use and used in the firm business notwithstanding her coverture, and she is not relieved from such liability by the fact that her partner after receiving the money diverted it to his own use.

In an action upon a firm note evidence as to what entries the bookkeeper made in relation to the loan or his opinion as to what he would have entered had he understood the transaction differently are immaterial.

Appeal from judgment entered upon the report of a referee.

Action on a demand note made by Joseph Burton, Jr., & Co., and endorsed by Joseph Burton. The firm was composed of Ann E. Burton and her son Joseph Burton, Jr., and her husband Joseph Burton assisted about the firm business, which was the manufacture of cigars.

Plaintiff, on Feb. 5, 1878, delivered to Joseph Burton \$1,000 in cash, which he agreed to loan to the firm and the firm was to give its promissory note for it and the note was to be endorsed by Joseph Burton. This was done and the note in suit given.

The making and endorsement of the note was not denied, and some evidence was given tending to show that it was given for money borrowed by the firm needed and used in its firm business.

*Fuller & Kellogg*, for appls.

*Hoyt & Lewis*, for respt.

*Held*, That as Mrs. Burton had embarked in business as a member of the firm she was liable upon the firm notes given for money to use and used in the firm business, notwithstanding her coverture. 42 N. Y., 613; 58 id., 80; 71 id., 199.

If her son and partner diverted the money or a part of it to his individual use after plaintiff had parted with it to the firm upon its note she still remained liable to plaintiff by virtue of the firm note. If plaintiff had been shown a party to a fraud practiced upon the female defendant by her son, then a different question might have arisen. But as the case was made before the referee the note was valid against the firm and no defense was made out by the female defendant. If her son and partner practiced a fraud upon her she must seek her remedies in that direction.

The bookkeeper of the firm was called and testified that he entered the receipt of this money in the cash book. He was asked "If the

\$1,000 had been loaned to the firm of Joseph Burton, Jr., & Co. what entries would have been made by you to show the transaction?" This was objected to as improper and immaterial. Objection sustained.

*Held*, No error. 78 N. Y., 158. The question did not call for a fact past, but for an opinion upon a supposed view of the transaction. If plaintiff loaned the money to the firm and took the note for it, it was not material what was done by the bookkeeper as to entries about it or what in his opinion he would have done by way of entries had he understood the transaction differently from what he did.

*Also held*, That it was not error to receive the notice of protest in evidence. The explanations of S. that he served a copy on the 1st of July and again on the 3d of July, together with the notice, satisfactorily established the liability of Joseph Burton upon the endorsement of the note. It was necessary to produce the notice of protest in order to have the explanations in respect thereto properly understood. The notice was effectual whether received by the endorser or not. 51 N. Y., 144.

*Also held*, That while some of the questions on the cross-examination of Joseph Burton might, in a wise exercise of discretion, have been excluded, we cannot say that the answers given worked injury to defendants.

*Also held*, That it was for the referee to consider the evidence of Joseph Burton, Jr., with the other and give such effect to it as in his

judgment it merited. He was a party to the record, though he had not served an answer. He was son-in-law of plaintiff and son of both defendants. There was ill feeling between him and his father and mother. They contradicted him and he contradicted them. The referee was therefore at liberty to believe or disbelieve his evidence in whole or in part. We ought not to disturb his conclusion based upon a disbelief or a belief of his evidence. 45 N. Y., 549; 70 id., 177; 73 id., 609; 78 id., 287; 31 Hun, 379.

Judgment affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## PLEADING. JOINDER.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

William W. Teall. *respl.*, v. The City of Syracuse, *applt.*

Decided April, 1884.

A cause of action for conversion of personal property and one for money had and received, being the proceeds of sale of said property, cannot be joined in a complaint.

Appeal from interlocutory judgment overruling demurrer to the complaint.

The demurrer is taken on the grounds: 1st, that the complaint does not contain facts sufficient to constitute a cause of action, and 2d, that two causes of action are improperly united.

The action is brought by plaintiff as the assignee of the Onondaga

County Bank. The first cause of action alleged in the complaint is for wrongfully taking and converting certain personal property belonging to said bank, of the value of \$3,200, with a claim for damages in that sum, with interest.

The second cause of action is for money had and received, the complaint alleging that on April 25, 1874, defendant received into its treasury and appropriated to its use the sum of \$857, the same being the proceeds of the sale of certain goods, etc. of the said bank, "being the same goods, etc., mentioned in the first count herein, before then wrongfully, etc., seized, taken and sold at public auction by said city of Syracuse, its agents and officers \* \* whereby the said city of Syracuse became liable to pay unto the said Onondaga County Bank the said sum of \$857, with interest."

*L. Marshall and M. A. Knapp*, for applt.

*Geo. N. Kennedy and E. Foreman*, for resp't.

*Held*, That the two causes of action were improperly united. The first cause of action is in tort for wrongfully converting the property by means of a wrongful seizure and sale thereof. The second cause of action is for the proceeds of the property, and the right to recover rests upon an implied promise or contract to pay, the tort being waived. 54 Barb., 168; 5 Den., 370. Prior to the present Code two such causes of action could not be united in the same complaint. Code Pro., § 167;

50 N. Y., 487; 65 Barb., 457; 12 How., 331; 15 id., 221; 9 Barb., 230; 9 How., 311; 23 id., 302; 58 id., 152; 61 id., 163; 56 N. Y., 332. We think § 484, Code Civ. Pro., has not changed the rule.

The complaint does not make it appear that both causes of action belong to one of the classifications named in the section. The first belongs to the 6th class of causes of action mentioned in § 484, and the second to the first class.

That the 9th subdivision of § 484 does not aid the respondent, because it is clear that the two causes of action are included in one of the foregoing subdivisions; and secondly, because it does not appear that "all of the causes of action" belong to one of the foregoing subdivisions. There can be but one claim or recovery. If it is in tort, the right to recover is because of the wrong. If in contract, it is because the wrong is waived and plaintiff succeeds upon the contract which the law implies after the waiver takes place. A recovery in tort would bar the action upon contract, and *vice versa*.

*Lattin v. McCarty*, 41 N. Y., 112, distinguished.

Here there is an averment of distinct causes of action; one in tort, the other in contract. The section referred to has not authorized such a union of causes of action as presented by the complaint. 50 Barb., 77.

Order and judgment reversed, with costs, and judgment ordered for defendant, with costs, and leave granted to plaintiff to amend

on payment of costs of appeal and of demurrer.

Opinion by *Hardin, J.; Barker, J.*, concurs; *Smith, P. J.*, not voting.

### DOWER. ABATEMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James McKeon et al., exrs., applts., v. James D. Fish, recr., respt.

Decided May 9, 1884.

The filing, in an action for the admeasurement of dower or for a sale of the premises and the awarding of a gross sum in lieu thereof, of a consent in writing to receive a gross sum in lieu of dower, etc., pursuant to the statute, does not give the plaintiff such a vested right in such unascertained sum that, in the event of her death before the entry in the action of an interlocutory judgment determining her right of dower and adjudging a sale of the premises, the suit can be carried on by her personal representatives to ascertain the amount of and to recover such sum. In such a case the action abates on the death of the widow.

It seems that the action might survive if the right of dower had been determined and a sale of the premises adjudged before the death of the plaintiff.

Appeal from judgment entered on report of a referee.

This action was commenced by Annie S. Freeman to have her dower in certain lands owned by her deceased husband admeasured, or to have such lands sold and a gross sum in lieu of dower awarded her. Pending the action and before any interlocutory decree therein determining her right of dower and adjudging a sale of the premises a consent in writing was

filed by her to receive a gross sum in lieu of dower, etc., pursuant to the statute. Subsequently, and while the action was still pending and prior to the determination thereof, Mrs. Freeman died, leaving a will, which was duly proved, in which James McKeon and Appleton Sturges were appointed executors, and this action was thereafter revived in their names. The referee to whom the action had been referred reported that the action abated upon the death of Mrs. Freeman, and that plaintiffs' complaint should be dismissed, and judgment was rendered accordingly.

*James McKeon*, for applts.

*Wingate & Cullen*, for respt.

*Held*, That at the time of the death of plaintiff's testatrix her action, notwithstanding the filing of her consent, had not reached a stage or condition in which she was entitled to claim a vested right to a gross sum of money equal to the value of her dower.

That a different state of things might exist if her right of dower had been determined and the proceedings in the action had reached a stage in which a sale of the premises had been adjudged. The case would then have been in a position entitling her to have the value of her dower right ascertained and a gross sum paid to her in lieu of dower; but, until that time, her right, beyond that to her share of the mesne profits of the estate, remained a mere naked and inchoate life estate and terminated with her death.

Judgment affirmed.

Opinion by *Davis, P. J.; Brady* and *Daniels, JJ.*, concur.

### APPEAL. NEW TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Frank D. Crim et al., exrs., *respts.*, v. Rufus G. Starkweather, impled., *applt.*

Decided April, 1884.

The judgment herein was reversed at General Term and new trial ordered unless plaintiff should stipulate to reduce it to the amount of the first cause of action. Such stipulation was given. Defendant thereafter appealed to the Court of Appeals, which reversed the judgment and ordered a new trial. *Held*, That thereupon the stipulation ceased to be operative and that all the issues were open for a new trial.

Appeal from order denying a motion by defendant.

Action to recover upon an endorsement of a promissory note and also for money loaned. The action was tried before a referee, who reported in favor of plaintiff's testator in his lifetime on both counts. Defendant appealed to the General Term, which decided that the judgment should be reversed and a new trial ordered before another referee, costs to abide event, unless plaintiff should stipulate to reduce the judgment to the amount due on the note, in which case the judgment as modified should be affirmed. Such stipulation was given and judgment entered for the amount of the note. Defendant thereupon appealed to the Court of Appeals, which reversed the judgment and

ordered a new trial, costs to abide the event. The reference was vacated and the case restored to the circuit calender in Aug. 1882, and this motion was thereafter made, based on the position that the right to try the second cause of action is gone. The motion was denied, the Special Term holding that the stipulation ceased to be operative when the judgment of the General Term was reversed by the Court of Appeals.

*Geo. W. Smith*, for applt.

*W. & N. E. Kernan*, for respts.

*Held*, No error. It appears from the record that when the case was heard in the Court of Appeals the judgment of the General Term, modifying and retaining part of the judgment entered on the report of the referee, was wholly reversed and a *new trial ordered*. The order for a new trial as directed by the Court of Appeals is unlimited and unrestricted by any terms of restriction or limitation to the issue relating to the first count of the complaint. Literally construed, it is an award of a new trial of the issues in the action. If the award by that court had been of a new trial of the issues as to the first count of the complaint a different question would have been presented. Code Civ. Pro., § 1220.

Again, it does not appear from the order of the General Term that there was an intention to give a final judgment against plaintiff on the second cause of action. The case does not, therefore, fall within § 1224 of the Code, which authorizes the

General Term "*in its discretion* to render final judgment." Nor does it appear from the order of General Term that plaintiff's complaint as to the second count was dismissed upon the merits, and the action of the General Term does not, therefore, stand as a bar to a second action or a second trial of the issues as to the second count. There remains no judgment expressly declaring or judgment roll making it appear that a judgment has been rendered upon the merits of the second count against plaintiff. Code Civ. Pro., § 1209. The effect of the stipulation to reduce the judgment to the amount found due on the first count was to vacate all other parts of the judgment based on the report of the referee. Defendant has treated the stipulation as having that effect, for he has not entered an order or judgment reversing the other parts of the judgment or dismissing plaintiff's complaint as to the second cause of action. Had defendant allowed the modified judgment to stand, he might have insisted with force that plaintiff had lost the right to try the issue as to the second count in this action. But he was not content with such modified judgment \* \* but appealed therefrom and took from the Court of Appeals a total reversal of the judgment of General Term and an absolute and unconditional order for a new trial of the action. Plaintiff's inducement leading him to stipulate is gone. It was taken away by the course pursued by defendant, resulting in the judg-

ment and award for a new trial obtained in the Court of Appeals. We cannot escape the conclusion that there is no judgment or stipulation now in force to prevent plaintiffs from insisting that they are entitled to a trial of all the issues in the action, those relating to the second as well as those relating to the first count of the complaint.

Order affirmed, with costs.

Opinion by *Hardin, J.; Smith, P. J., and Barker, J.,* concur.

## PARTNERSHIP. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Union National Bank, of Rahway, N. J., *applt.*, v. Howard L. Underhill, *implyd., respt.*

Decided May 9, 1884.

One member of a partnership has no power to bind his copartner by giving the firm note for his own individual debt without the knowledge, assent or authority of his copartner; and the person receiving such note, with knowledge that the firm name was used for such purpose, cannot enforce it against the other members of the firm.

The rule that the admissions of one partner during the existence of the firm are evidence against his copartner when they relate to partnership transactions does not include admissions or statements which may be designed or expected to have the effect of subjecting the members of the firm to the payment of what appears to have been the individual indebtedness of the partner whose admissions are offered as evidence.

Appeal from judgment recovered on the verdict of a jury rendered by direction of the Court.

In January, 1877, the defend-

ants Underhill & Cheyney formed a copartnership under the firm name of Jesse S. Cheyney & Co. Previous to that time Cheyney had been accustomed to present his checks, drawn on the East River National Bank and endorsed by one Vail, for discount to plaintiff, who discounted the same. In Jan., 1877, Cheyney informed the president of the plaintiff that he had a partner, but Cheyney's check continued to be presented and discounted, and no check was presented for discount for, or in the name of, the firm. Finally, a check given by Cheyney and discounted by plaintiff was not paid by the bank on which it was drawn, but was protested. The plaintiff then applied to the endorser Vail to have the check taken up and retired; and, for the purpose of doing so, Vail gave to plaintiff three notes of the firm of Jesse S. Cheyney & Co., payable to his order, and this action was brought to recover the amounts of these notes. The defendant Underhill set up as a defence that the said notes had been made by Cheyney for the payment of his individual indebtedness and without the knowledge, assent or authority of his copartner. Upon the trial evidence was offered of admissions or representations made by Cheyney that the money raised upon the checks discounted by plaintiff was used in the firm business, which was excluded.

*Robert S. Green*, for applt.

*Hamilton Odell*, for resp't.

*Held*, That, as the notes in suit were presented to the bank by the

indorser, drawn in the name of Cheyney & Co., it must have been known to the president of the bank that they had been made and obtained to settle and adjust the individual debt of Cheyney.

That Cheyney as a member of the firm had no power to bind his partner in this manner for the payment of his own individual debt without the knowledge, assent or authority of his copartner; and the bank, having received the notes with knowledge that the firm name was used by Cheyney for this purpose, was incapable of enforcing them against the other member of the firm. 21 Hun, 178.

That the evidence of Cheyney's admissions was properly rejected, for no other effect could have been expected to have been secured from them than to charge his partner with liability for the checks; and, while it is true in a general sense that the admissions of one partner during the existence of the firm are evidence against his copartner when they relate to partnership transactions, 18 Hun, 502, this rule does not include admissions or statements which may be designed or expected to have the effect of subjecting the members of the firm to the payment of what appears to have been the individual indebtedness of the partner whose admissions are offered as evidence. 21 Wend., 365.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.



## AGENCY. CUSTOM.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Martin Kedian et al., *respts.*, v.  
Joseph B. Hoyt, *applt.*

Decided May 9, 1884.

An action may be maintained against a person individually upon whose authority materials have been furnished and labor performed, although such work was performed and materials furnished for the benefit of property belonging to him as trustee.

In an action to recover money paid to persons employed by plaintiffs, under the authority of defendant, to perform work for the latter, the bills furnished by such persons and paid by plaintiffs are competent evidence to show the amounts alleged to have been paid out by plaintiffs.

A custom of trade whereby mechanics who are employed to make general repairs to buildings are accustomed to receive from mechanics in other lines of business whom it is necessary for them to employ in the course of making such repairs, ten per cent. rebate of the bills furnished by them, and then charge this rebate against the person for whom the repairs are made, is vicious and unlawful and will not be sanctioned by the courts.

In an action to recover the amount claimed to be due for making such repairs, the fact that plaintiffs have received such rebate is not a defence to the whole action, but only entitles defendant to a reduction of plaintiff's claim to that extent.

Appeal from judgment recovered on the verdict of a jury and from order denying motion for a new trial.

Plaintiffs, who were plumbers, were employed by defendant to make some repairs to certain houses owned by him as trustee, in the course of making which it was necessary for them to employ mechanics in other lines of business, and this action was brought to re-

cover for work and labor performed and materials furnished by plaintiffs in making such repairs, and also to recover the amounts alleged to have been paid to such other mechanics. The right of plaintiffs to maintain the action against defendant individually was contested at the trial.

*Stewart L. Woodford*, for *applt.*

*John M. Bowers*, for *respts.*

*Held*, That since the materials had been furnished and the labor had been performed under the authority of defendant, although he was the trustee of an estate, an action against him individually for the amount due could regularly be maintained. 47 N. Y., 360; 73 id., 127, 131.

Upon the trial the bills furnished by the other persons employed by plaintiffs and paid by them were received in evidence against the objection and exception of defendant.

*Held*, No error; that they were properly received to show what had been done, the extent of the charges made, and the amount alleged to have been paid out by plaintiffs.

It appeared on the trial that plaintiffs were allowed a rebate of ten per cent. upon the bills of the persons employed by them to do other work and furnish other materials for the buildings required to be repaired, but that they charged defendant with the face value of such bills, and they were allowed to recover this amount upon the trial upon the ground that the receipt of such a rebate was a custom of the trade.

*Held*, Error; that such a custom was vicious and unlawful, and that plaintiffs could not retain the benefit derived therefrom. 63 Barb., 500, 504; 52 N. Y., 312; Wharton on Agency, §§ 238, 240; 56 N. Y., 456, 461; 52 Barb., 173, 179; L. R., 2 Q. B. Div., 549; *id.*, 552; 10 Chan. App., 515, 526.

An application was made upon the trial upon the part of defendant for leave to amend his answer in such a manner as to allow the misconduct above mentioned to be relied upon as a legal defense against the entire claim for money paid out. This application was denied.

*Held*. No error; that the fraudulent misconduct of plaintiffs did not affect their right to reimbursement of the amount actually paid out by them to the other mechanics, but extended no further than to defeat their claim for the ten per cent. not paid out by them.

Judgment reversed, unless plaintiffs should stipulate to reduce it by deducting said ten per cent., but if such stipulation should be given then judgment should be affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Haight, J.*, concur.

FORECLOSURE. DEFICIENCY.  
N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

William Siewert, *respt.*, v. Dedrick Hamel, *applt.*

Decided May 9, 1884.

When an action is brought to foreclose a second mortgage on real property and sub-

sequently another action is commenced to foreclose the first mortgage, and this second action proceed to judgment before the first, and the premises are sold under the judgment entered therein, leaving a surplus which the second mortgagee procures by the usual proceedings and applies upon his mortgage, and subsequently a judgment of foreclosure and sale is entered in the action to foreclose the second mortgage, the second mortgagee is entitled to have a judgment for the deficiency still remaining due upon his mortgage entered in his action without going through the form of a sale, &c., of the premises.

Appeal from order of Special Term.

Plaintiff brought this action to foreclose a second mortgage upon certain real property of defendant. During its pendency the first mortgagee brought an action to foreclose his mortgage, and judgment was entered therein, and the property sold thereunder before judgment was entered in this action. After the satisfaction of the first mortgage there was a surplus left which the plaintiff in this action procured by the usual proceedings, and applied upon his mortgage, upon which there still remained a deficiency after such application. Subsequently a judgment of foreclosure and sale was entered in this action, and thereupon plaintiff, without going through the form of a sale, applied for an order directing the entry of a judgment for such deficiency, which was granted, and from such order defendant appealed. It was claimed by defendant that the court had no power to enter such a judgment, and that plaintiff should be obliged to resort to an action on the bond.

*Wm. McCrea*, for applt.

*Edgar Whillock*, for respt.

*Held*, That inasmuch as no sale of the premises described in the mortgage given took place under plaintiff's judgment, a sale of them having been already made by legal process, and as no good could result from such an incident, and as it would, therefore, be a work of supererogation, the plaintiff herein should not be subjected to the necessity of abandoning this action in which the deficiency, if any existed, was decreed, and be compelled to resort to an action on the bond, and thus obtain a judgment *in personam*.

*Loeb v. Willis*, 22 Hun, 508, distinguished.

Order modified by correcting an error in computing interest and affirmed in all other respects.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Mary Power et al., admrs., v. The N. Y., L. E. & W. RR. Co.*

Decided April, 1884.

Plaintiff's intestate was working upon a defective hand car, the handle of which had been broken for two weeks, to the knowledge of the foreman, a crowbar being used in place thereof, which acted irregularly on the walking beam, causing it to break, whereby intestate was precipitated from the car and killed. *Held*, That the questions of negligence and contributory negligence should have been submitted to the jury, and that it was error to non-suit.

Motion by plaintiffs for a new trial after a non-suit at circuit.

Action to recover damages for the death of plaintiff's intestate, caused, as alleged, by defendant's negligence.

Deceased was at work with a gang of men under the supervision of one K. in repairing defendants' track. K. had been foreman for some years, employed and discharged the men, directed what tools they should use, and when and how they should use and operate the hand car used on the section.

About two weeks before the accident one of the wooden handles of the hand car became broken, and so remained to the knowledge of K. In its place a pick handle or an iron crowbar was used. The bar was smaller in diameter than the socket of the walking beam, and the force of the men laid out on it was delivered irregularly on the beam, which broke while the car was being propelled, and deceased was thereby precipitated suddenly to the ground and received the injuries which caused his death.

On these facts the court granted a non-suit.

*M. E. & E. M. Bartlett*, for motion.

*Sprague, Morey & Sprague*, opposed.

*Held*, Error. Whether deceased was guilty of contributory negligence or not was a question of fact for the jury. It was the duty of defendant to furnish and keep in repair suitable machinery, implements and hand cars which it required the deceased to use. 25 N. Y., 562; 49 id., 521; 53 id.,

549 ; 59 id., 519 ; 81 id., 208 ; 25 Hun, 146 ; 89 N. Y., 384 ; 29 Alby. L. J., 150. After the hand car was broken defendant's foreman, with knowledge of its disabled condition, continued it in use, and required the men to operate it. It might have been found as a fact that he knew the danger of such use, and that deceased did not know or appreciate the danger from such use of it. 25 Hun, 146 ; 89 N. Y., 384.

"The fact that deceased knew or ought to have known that there was some danger does not excuse the master if the danger was greater than the servant, in the exercise of due care, had reason to anticipate, and the amount of the danger and the circumstances that led the servant to enter it are proper questions for the jury." Wood's Master and Servant, 760 ; 89 N. Y., 385.

The Court ought not to have said as matter of law that plaintiff's intestate was guilty of contributory negligence. 79 N. Y., 464 ; 89 id., 384. Whether the injuries were the result of defendant's neglect of duty was a question of fact for the jury. 89 N. Y., 384 ; 81 id., 208. Both branches of the case should have been submitted to the jury.

New trial ordered ; costs to abide event.

Opinion by *Hardin, J.* ; *Smith, P. J.*, concurs ; *Barker, J.*, dissents.

## ADMINISTRATORS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*In re* will of Harriet Chase, deceased.

Decided April, 1884.

Probate of a will being contested and the proceedings continued, the special guardian for the sole heir at law made application on his petition and the foregoing proceedings for the appointment of a temporary administrator. The petition stated that the petitioner "as such special guardian" prayed for such appointment. *Held*, That the application was that of the infant, and therefore of a person interested in the estate ; that the proceedings and petition presented all the jurisdictional facts.

Appeal from order of Surrogate appointing a temporary administrator of the goods of Harriet Chase, deceased.

Said Harriet Chase died in June, 1883, leaving only one child and heir at law, an infant aged about 14 years. She owned at her death three dairy farms and about \$25,000 of personal property. The will of the deceased being offered for probate by the executor, one T. was appointed special guardian for the infant, and filed objections to the will. Witnesses were examined and the proceedings remained pending and undetermined.

August 18, 1883, T. signed and verified a petition praying "as such guardian" for the appointment of a temporary administrator, and gave notice for the 3d of Sept. of an application for such appointment, stating that the application would be made "on the proceed-

ings heretofore had herein and upon the foregoing petition."

On the return day the executor objected "to any proceedings on the petition," first, because the petitioner is not a person interested in the estate of Harriet Chase, or a person authorized to make the petition, and second, that the petition does not show facts giving jurisdiction.

The objections were overruled and the appointment granted.

*Lansing & Rogers*, for exr., applt.

*C. W. Thompson*, for respt.

*Held*, No error. The notice of application for the appointment of a temporary administrator was given ten days before the application was made. That was a compliance with § 2669 Code Civ. Pro. It stated "that on the proceedings heretofore had herein and upon the foregoing petition," the application would be made. That authorized the moving party to read his petition and the proceedings already had in the Surrogate's Court. By them it appeared that T. had been appointed special guardian for the infant, and that he was the only heir at law of deceased. The application was made in his behalf. The application being that of *the infant* was by "a person interested in the estate" of which the Surrogate had jurisdiction. The proceedings and petition showed all the jurisdictional facts, and the Surrogate's Court was called upon to exercise its discretion under § 2668 Code Civ. Pro. That section confides to the "discretion" of the Surrogate the

power to issue \* \* letters of temporary administration in certain enumerated cases. This case is one of those named in the statute, as *delay* in granting letters testamentary or of administration necessarily occurs in consequence of a contest arising upon an application therefor or for probate of a will. Code, § 2668, sub. 1. The section expressly confers a discretion upon the Surrogate's Court, and we ought not to set aside the result of his discretion, as a proper case within the terms of the statute was made. See 24 N. Y., 169. Three dairy farms, with the usual personal property thereon, needed attention, and there was some \$25,000 of personal property left by Mrs. Chase.

*Buffalo Catholic Inst. v. Bitter*, 87 N. Y., 255, distinguished.

Order affirmed, with costs.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## POWERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Sophia A. Kinnan, exrx., respt.*,  
v. *Egbert Guernsey, exr., et al., appls.*

Decided May 9, 1884.

In 1846 defendant's testatrix, her husband and one C. entered into a marriage settlement agreement whereby certain property was conveyed to C. upon trust to apply the income thereof to the use of defendant's testatrix during her life and "from and after her decease, upon trust to convey and transfer the said premises to such person or persons, to such uses and purposes and in

such manner as she by her last will and testament \* \* \* may, whether sole or covert, direct, limit or appoint." Defendant's testatrix subsequently entered into an agreement with her son, upon paying to him his share of his father's estate of which she was executrix, to hold him harmless from a judgment which had been recovered against her as such executrix and to pay and satisfy said judgment; and her will, which was subsequently made, contained the following clauses: "And whereas an application is about being made to the Supreme Court for leave for my trustee to apply so much of the principal of the trust estate as may be necessary to carry out said contract, now, therefore, in and by this will, pursuant to the authority contained in said trust deed, I do hereby authorize, ratify and confirm such application of so much of the principal as may be found necessary to carry out said agreement, whether the same shall, or shall not, be confirmed by the court." In an action to compel her executor to pay the said judgment, *Held*, That her will contained a valid execution of the power conferred upon her by the marriage settlement agreement.

Appeal from a judgment recovered on trial at Special Term.

In 1846 defendant's testatrix, her husband and one C. entered into a marriage settlement agreement whereby certain property was conveyed to C. upon trust to apply the net income thereof to the use of the defendant's testatrix during her life; and, "from and after her decease, upon trust to convey and transfer the said premises to such person or persons, to such uses and purposes and in such manner as she by her last will and testament \* \* \* may, whether sole or covert, direct, limit or appoint.

The husband of defendant's testatrix subsequently died, leaving a will appointing her his executrix, and a judgment was recovered

against her, as such executrix, by the plaintiff herein. Thereafter, she paid over to her son his share in his father's estate, at the same time entering into an agreement with him to save him harmless against said judgment, and agreeing to satisfy and discharge the same. Her will, which was subsequently made, contained the following provisions: "And whereas an application is about being made to the Supreme Court for leave for my trustee to apply so much of the principal of the trust estate as may be necessary to carry out said contract, now, therefore, in and by this will, pursuant to the authority contained in said trust deed, I do hereby authorize, ratify and confirm such application of so much of the principal as may be found necessary to carry out said agreement, whether the same shall or shall not be confirmed by the court." Defendant's testatrix died without having paid this judgment, and plaintiff brought this action against her executor to compel its payment by him. It was claimed by defendant that the power given his testatrix was too limited to allow the direction made by her in her will to be valid.

*Charles F. Stone and John K. Porter*, for appls.

*Joseph F. Choate and Chas. F. Southmayd*, for resp't.

*Held*, That the power granted to defendant's testatrix was a general, beneficial power, and was authorized by the laws of this State. 2 R. S., 6th ed., 1114, §§ 97, 98, 101 and 127.

That the instrument granting

this power authorized her to devote the property to such uses and purposes and in such manner as by her last will and testament she might direct, limit or appoint. That this was, of itself, an exceedingly broad authority allowing her to exercise her discretion or judgment as to the uses and purposes to which the estate, or any part of it, might be devoted; and since she observed the requirements of the law in the instrument appointing and directing the execution of the power, and the disposition of the property was within the authority reserved over it to her, it follows that this was a valid appropriation of it to the payment of the judgment.

That what the law requires for this purpose is such a direction as intelligently refers to the power, and discloses the intention on the part of the donee of carrying it into effect. 11 Johns., 169; 2 R. S., 6th ed., 1130, § 2.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### LIBEL. JOINT STOCK ASSOCIATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Henry Van Arnham, *respt.*, v. Chas. W. McCune, *prest.*, *applt.*

Decided April, 1884.

A joint stock association organized under the laws of this State, and having a president or treasurer, is liable to an action for libel although it does not appear that it consists of seven or more shareholders or associates.

Appeal from judgment entered on verdict and from order denying motion for a new trial made on a case and exceptions.

Action for libel brought against defendant as President of "The Courier Co." The complaint alleged that defendant is "a joint stock company, or association, duly formed, organized and acting under and by virtue of the laws of this State."

Defendant admitted on the trial that the Courier Co. was a joint stock association, as alleged in the complaint, and that defendant was its president at the commencement of the action.

Plaintiff gave proof of the libelous publication and defendant gave some evidence in mitigation.

In the course of the trial a motion for non-suit was made on two grounds: 1. Because the action was not of such a nature that it could be maintained against a joint stock association in the name of its president or treasurer; 2. Because if it were such an action there is no proof that the company consists of seven or more shareholders or associates. The motion was denied.

*John G. Milburn*, for *applt.*

*D. H. Bolles*, for *respt.*

*Held*, No error. By Chap. 258, Laws of 1849, the Legislature authorized suits against joint stock associations to be brought against the president or treasurer "for the time being" of such stock company or association. See Chap. 455, Laws of 1851; Chap. 153, Laws of 1853; Chap. 245, Laws of 1854; Chap. 289, Laws of 1867. Since the Act of 1849 and its

amendments, the Legislature has adopted § 1919, Code Civ. Pro., which incorporates the substance of the previous legislation in respect to bringing actions "upon any cause of action" against all the associates. It then declares "any partnership or other company of persons which has a president or treasurer is deemed an association within the meaning of this section."

That the action was properly brought against defendant, and that there was not a failure of proof upon the trial, and that the motion for non-suit was properly denied. Code, § 1919; 74 N. Y., 234. An association of the character shown by the pleadings, admission and proofs is liable to an action for libel. 9 Hun, 294; 75 N. Y., 604. See also 21 How., U. S., 202.

In many respects joint stock associations are like corporations; in other respects they resemble co-partnerships. 50 Barb., 157; see also Const. of N. Y., art. 8, § 3.

Judgment and order affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

#### DEEDS. WHARFAGE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edmund Coffin, Jr., *applt.*, v. John Scott et al., *respts.*

Decided May 9. 1884.

A deed from the City of New York granting land under water extending southerly from the middle of Thirty-fourth street, as it was laid out, into the Hudson River, on a cer-

tain map of lands under water, and extending westerly to the exterior line of N. Y. City, as it was laid out on said map, together with all wharfage, etc., growing from that part of the exterior line of said city lying on the westerly side of the lands so granted, contained the following reservation clauses: "Saving and reserving from and out of the hereby granted premises so much thereof as forms part or portions of the Thirteenth avenue and Thirty-fourth street, for the uses and purposes of public streets," and "excepting such wharfage, etc., to grow from the westerly end of the bulkhead in front of the entire width of the part of Thirty-fourth street which shall be and hereby is reserved for the City of N. Y." *Held*, That the City reserved the fee of the lands composing Thirty-fourth street, and all the wharfage accruing from the use of any pier to be built within the boundaries of Thirty-fourth street, and the right to use the navigable waters on the south side of such pier until the same should be lawfully occupied by other piers.

A person owning land in the City of New York, lying under the navigable waters of the Hudson River, which land extends up to the side of a pier owned by another person, is not entitled to recompense for the use of the water over such land by vessels in approaching and lying at said pier.

Appeal from judgment of Special Term dismissing complaint.

Plaintiff derived title to certain land in the City of New York, lying under the waters of the Hudson River, by deed from one D., to whose ancestor the city, in 1852, granted a tract of land under the waters of the said river, extending along the water front southerly from the middle line of Thirty-fourth street, as that street was laid out, into the river, on a certain map of lands under water, and extending westerly to the exterior line of said city, as the same was laid out on said map, together with all the wharfage, etc., growing from that part of the exterior



line of said city lying on the westerly side of the lands so granted, "saving and excepting from and out of the premises so granted so much thereof as formed part or portions of Thirteenth avenue and Thirty-fourth street, for the uses and purposes of public streets," and "excepting such wharfage, etc., to grow from the westerly end of the bulkhead in front of the entire width of the  $\frac{1}{4}$  part of Thirty-fourth street, which shall be and hereby is reserved for the City of N. Y."

The city subsequently built a pier upon the land included within Thirty-fourth street and leased it to defendants. Plaintiff claims that he was entitled to collect wharfage for the use of all the southerly side of this pier, and brought this action to recover such wharfage, and for slippage for the use of the water lying over plaintiff's land on the southerly side of said pier which was used by vessels in approaching and lying at said pier. It was proved that this water was part of the navigable waters of the Hudson River.

*Isidor Grayhead*, for applt.

*S. G. McNary*, for respts.

*Held*, That by the reservations contained in the grant to D., the city reserved the fee of the land contained in the boundaries of Thirty-fourth street, 93 N. Y., 129, and also exclusively reserved all the rights to the use of the whole of the pier built within the bounds of said street, and, consequently, plaintiff was not entitled to wharfage growing from the use of any portion of said pier, and

that the city also reserved the right to use the navigable waters on the south side of the pier until the same should be lawfully occupied by other piers.

That the plaintiff had no legal right to exact compensation for the use of the navigable waters of the river, and since no other use was shown of those waters, or of the land under them than that of simply using them to navigate defendant's vessels to and from the pier, and lying there while loading, etc., and no evidence was given showing that defendant's vessels have been accustomed to lie at anchor in those waters, or to do any other act indicating a use of the soil belonging to plaintiff, he was not entitled to slippage or anchorage. 26 N. Y., 292; 37 N. Y., 282.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Catherine Murphy, admrx.,  
*respt.*, v. The N. Y., L. E. & W.  
RR. Co., *applt.*

Decided April, 1884.

If an employee is injured by the sudden starting or uncontrolled speed and motion of an engine, caused by its being defective or out of repair, and the corporation has notice of such defect, it is liable for such injury, and it is no defence that the engineer might have so managed the engine as to have prevented the injury.

Appeal from judgment entered on verdict for plaintiff, and from order denying motion for a new trial on the minutes.

Action to recover for the killing of plaintiff's intestate, caused, as alleged, by defendant's negligence.

Intestate, who was employed by defendant, was killed Nov. 27, 1880, by the collision of a wild engine known as No. 56, which escaped from its hostler, with the car on which he was at work. The hostler, while attempting to back the engine, pulled the throttle open, found it wide open, and was not able to shut off the steam or reverse the engine, and after diligent efforts to do so jumped off, and the engine ran twenty or thirty rods and struck the car on which intestate was at work.

He testified that the connecting rod was too long, and in drawing the throttle-valve open the valve was raised out of its seat; and that the wings were a little too short, and instead of shutting down as they ought, they caught over the seat, and that because they were square-shouldered when the effort to shut off was made one of the wings struck on the seat.

Some evidence was given tending to show that a sudden jar might disengage the throttle so that it would go back to its place, and that had a pin been supplied to prevent the throttle from being opened to its fullest extent the accident would not have occurred. Other evidence was given by both parties bearing upon the condition of things existing at the time of

the accident, and as to a similar occurrence on a former occasion when an engine became uncontrollable from a similar cause in the hands of defendant's employees.

*Sprague, Morey & Sprague*, for applt.

*Chas. F. Tabor*, for respnt.

*Held*, That the question of defendant's negligence was properly left to the jury. 83 N. Y., 574; 92 id., 640; 80 id., 622; 81 id., 206. It is the duty of a master to furnish suitable machinery for the use of its employees. If an employee is injured by the sudden starting or uncontrolled speed and motion of an engine, caused by its being defective or out of repair, and the corporation has notice of such defect, it is liable to the employee. Its neglect is the foundation for an action, and it is no defence that the engineer could have so managed the engine as to have prevented the collision which caused the injuries. 81 N. Y., 206.

The hostler was asked, "What in your judgment caused the accident; the failure of the lever to work to shut off the steam?" This was objected to as *not a proper question for expert evidence*, and that the witness was not shown to be qualified to give an opinion upon it, and as immaterial and incompetent. The objection was overruled and the witness allowed to testify as above stated.

*Held*, No error; the facts which the witness gave in answer to the question were proper and related

to the actual condition of things upon engine 56 when the injuries occurred. Besides, it appeared that the witness was familiar with and had handled and used many engines before the one which he undertook to describe. The facts pertaining to the engine were pertinent and material, and therefore were properly allowed to enable the jury to determine whether the engine was defective.

*Also held*, That it was not error to allow the witness to state that he did not know "whether a valve with shoulders on it like that was in use by any other railroad," although he said he had seen a great many locomotives on different roads prior to Nov., 1880.

The court was requested to charge that there was no evidence that "the throttle was not recognized by mechanics and men skilled in railroad machinery as being a safe and proper throttle at the time of the accident." He refused to charge as requested, but stated that he did not understand that there was any direct evidence to that effect, or to the effect that it was not a proper throttle," though there may be some circumstances which the jury should have the right to take into consideration in determining as to whether or not it was a safe and proper throttle.

*Held*, No error; that the charge was sufficiently favorable to defendant.

*Also held*, That it was not error to submit it to the jury to say whether "the valve was of a proper and safe construction."

Judgment and order affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## EVIDENCE. STIPULATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

John Garwood, *respt.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided April, 1884.

A stipulation that either party may read the testimony of the witnesses given in a former action with the same effect as though they were personally present and examined applies only to such testimony as is competent and material to the issues in the second action.

Appeal from judgment on the report of a referee.

Action to recover damages to plaintiff's mill between November 5, 1873, and March 10, 1879, alleged to have been caused by a diversion of water by defendant. In a former action, tried in 1874, plaintiff recovered for prior damages.

In this action a stipulation was made that either party might read from the printed case in the other trial the testimony of the witnesses in the case with like effect as though they were personally present and examined. Plaintiff gave evidence to show that the rental value of the mill was diminished \$250 per year by the diversion of 5,000 barrels of water daily. The referee, under objection, allowed plaintiff to read the testimony so taken as to events anterior to the period embraced in this action, including the evidence of one P., who left defendant's employ in

April, 1873, as to the amount of water drawn by defendant from the creek during the period of his employment, viz., 5,000 barrels per day.

*Geo. C. Green*, for applt.

*Jas. Breck Perkins*, for respt.

*Held*, Error. The referee seemed to think the stipulation allowed all the testimony taken in the prior action, whether it was competent or material in this action. In this regard we think he misconstrued the stipulation. The testimony which was competent in this action was doubtless to be read with like force and effect as though the "witnesses were personally present and examined." But we do not think the intention was to let in testimony not pertinent in this action or material to the issue here made. We do not see how the quantity taken at the period embraced in the former action established what was diverted during the period embraced in this action.

Again, defendant gave evidence tending to show that if 5,000 barrels of water were worth \$250 to plaintiff's mill, the water used to run the mill to its full capacity, valued in that ratio, would make the rental value of the mill \$64-185.78, or \$62,685.78 more than plaintiff states the rental value in his complaint.

One L. was allowed to give an opinion as to how much the mill would be increased in rental value by "the steady addition to the stream, at different hours of the day, of 5,000 barrels of water." It had not been shown that he was

acquainted with plaintiff's mill, or had the requisite knowledge of the mill and its water power to form an intelligent opinion of what would be the effect upon it by the diversion of the water made by defendant.

*Held*, Error; that the objection that the witness was not shown competent to give the opinion asked for was improperly overruled. 3 Seld., 183; 43 N. Y., 279; 9 Cush., 337; 57 Barb., 604.

The referee found that plaintiff's mill had been reduced in rental value \$240 per year, and in doing so may have given effect to the evidence improperly received.

Judgment reversed and new trial ordered before another referee, costs to abide event.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

#### REFERENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Margaret Drury, applt.*, v. *Margaret Wigg, admrx., respt.*

Decided April, 1884.

It is the duty of a party seeking to question a referee's finding of law to request and obtain proper findings of fact.

A referee is not bound to give credence to the testimony of interested parties, though uncontradicted.

Appeal from judgment entered upon the decision of a referee dismissing plaintiff's complaint.

Action to recover certain notes claimed to have been given to plaintiff by defendant's intestate.

The report stated that "after

hearing the proofs offered on the part of plaintiff, and the proof on the part of defendant of the due appointment of defendant as administratrix of the estate of Sarah Wigg, deceased, and the counsel for defendant having thereupon moved upon the testimony so given that the complaint be dismissed and plaintiff non-suited, after hearing the arguments of counsel I find as a *conclusion of law* that defendant is entitled to a judgment of non-suit against plaintiff, with costs." No other findings of fact or law appear in the report or case submitted.

*Daggelt & Norton*, for applt.

*T. J. Gamble*, for respt.

*Held*, That appellant has failed to present any error for which the judgment should be disturbed. The report does not comply with § 1022, Code Civ. Pro. If we assume that the referee found the facts favorable to defendant needed to support his conclusion of law the judgment must be affirmed. It was the duty of the party seeking to question the referee's finding of law to request and obtain proper findings of fact. The right to such findings could not have been properly denied by the referee. It is a matter of substantial right that there be separate findings of fact and conclusions of law. Old Code, § 272; Code Civ. Pro., § 1022; 46 N. Y., 579. It was incumbent upon the appellant to see to it that the facts he requires are inserted in the referee's report. 54 N. Y., 219; 20 id., 184; 22 id., 323; 46 id.,

263. Without the findings of fact it is difficult, if not impossible, to decide upon what theory the referee arrived at his conclusion. This difficulty arises in consequence of the failure of appellant to seek and obtain proper findings as the practice requires. 54 N. Y., 220.

But if we assume that the referee in granting the motion found the essential facts against plaintiff (although we think it is difficult to so read the case), then we are called upon to say whether such a finding was erroneous.

Such a finding of the facts as would support a gift by the sister of plaintiff to her of the notes mentioned in the complaint was essential as the basis of a right to recover them from defendant, who was the administrator of plaintiff's deceased sister and her sole heir at law. Whether such a gift of the note was made to plaintiff depended upon the testimony of plaintiff in part, and largely that of her daughter. If the referee refused to give credence to such witnesses, we are not at liberty, as the case stands, to say that he committed an error of law. 86 N. Y., 547; 8 Daly, 210, 269.

Judgment affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## BAR LIMITATION. TRUST.

### N. Y. COURT OF APPEALS.

Harpending, admr., *applt.*, v. Arnot, *respt.*

Decided June 24, 1884.

On a sale on foreclosure the mortgagee bid in the premises for less than the mortgage, and gave an option allowing one B. to purchase the premises within a certain time on payment of the amount of his mortgage and the mortgage of one R. This option was assigned to A., who agreed to perform the terms and conditions thereof, but failed to do so within the time limited. A. subsequently purchased the premises. In an action brought by R. in 1870, to recover the amount of his mortgage under the terms of the option, judgment was rendered against him. In this action, begun in 1879 by R.'s administrator to charge A. with a trust in said premises. *Held*, That the former adjudication was a bar; that the action could not be maintained on the ground of fraud as the statute of limitations was a bar and that it was not a case for the application of the doctrine of constructive trusts.

Affirming S. C., 16 W. Dig., 392.

Prior to September 1, 1868, one J. R. owned certain lands which he had purchased of one C. for \$76,000. J. R. had executed to C. a mortgage for \$50,000 to secure a portion of the purchase money. On September 1, 1868, J. R. executed another mortgage of \$50,000 on the premises to secure his father N. R., plaintiff's intestate, and his uncle J. T. R., for such liability for indorsements as they had then incurred or might thereafter incur for him. Among their liabilities was a note for \$10,000 held by the C. Bank, of which A., the defendant, was a vice-president and director, and various other notes held by banks and individuals, aggregating about \$25,000. Early in 1868, J. R. became insolvent, and in August of that year C. commenced a foreclosure of his mortgage. N. R. applied to A. for assistance, and he agreed that if J. R.'s other creditors would join him and advance funds in propor-

tion to the debts respectively held by them to an amount sufficient to save the property, he would aid N. R. in carrying it. This arrangement was not effected. On November 25, 1869, the premises were sold under the foreclosure of the C. mortgage and bid in by him for less than the amount of his mortgage lien. J. R., one B., the attorney of N. R., and A. were present at the sale. After the sale C., at the solicitation of J. R., who was acting in the interest of his father and uncle and B., executed a writing to B., giving him the privilege of repurchasing the property within thirty days for \$56,321.40. B. voluntarily provided in said writing that in case he availed himself of said option he would pay to N. R. the further sum of \$50,000, as follows, \$10,000 held by the C. Bank, three notes of \$15,000 each, held by three other banks, \$10,000 by a proportionate interest to that extent in the property, and \$15,000 at various dates in money. C. and the other parties present wished to have this option executed and delivered to A., but A. refused to incur any liability on account of the transaction, and suggested that the option should be given to B. All parties then expected that the creditors of J. R. might be induced to assist him by advancing the money due to C., and the R.'s relied upon A. to accomplish this. About ten days before the option would expire B., at the request of A., and for the sole purpose of enabling him to realize the expectations of the parties interested in

securing the active co-operation of J. R.'s other creditors in purchasing the property, executed an assignment of the agreement of repurchase to A. for the consideration therein expressed of one dollar, and also in consideration that he would in all things truly keep and perform all the terms and conditions to be kept and performed by B., and especially that he should pay and secure to be paid to J. R. \$50,000. On December 20th, the day on which the agreement of repurchase would, by its terms, expire, B. and A. having failed to get the other creditors of J. R. to aid, applied to C. for an extension of time, A. stating to him in the presence of B. and J. R. that the parties he represented could afford to lose their interest, but would not consent to tie up the amount required to buy the property on the terms of the B. option, but if an extension of said option should be granted he thought he might be able to secure the co-operation in the purchase of J. R.'s other creditors. C. reluctantly gave an extension of twenty days, expressly stipulating that time was of the essence of this extension. Further efforts to secure the assistance of the other creditors were unavailing. On the last day of the extension A. and J. R. applied to C. for further time; this he refused and requested A. to complete the purchase under the option. A. replied that he had been unable to secure the assistance of the other creditors and would not buy the land under the option. Two days after the option

had expired, A., at the earnest solicitation of C. and J. R., consented to buy and take title to the land, paying and securing to be paid C., \$56,321.40 therefor. At the same time A. executed to M. R., at the request of J. R. and C., an agreement giving them the privilege of repurchasing the property on or before September 12, 1870, on paying \$74,477.88, the amount and interest paid and agreed to be paid by A. to C., and also the amount due the C. Bank, with added interest to the date of payment, and \$6,000 for A.'s trouble, risk and expense. This agreement after it was made was delivered to J. R. and has never since been returned to A. This action was brought by plaintiff, as administrator of N. R., to charge A. with a trust in favor of N. R. in said premises. There was evidence that N. R., in March, 1870, on learning of the existence of A.'s agreement and its terms, repudiated J. R.'s authority to act for him in making it, and demanded payment by A. to him of the price named in the original option, as upon a purchase by A. under that agreement. The evidence showed that between the time A. executed his agreement and September 12, 1871, N. R. not only declared his intention to avail himself of the privilege secured to him by the option, but freely and openly offered his interest for sale to various parties.

In the fall of 1870 N. R. brought an action against A. to recover \$50,000, provided by the C. option to be paid to him in case the said

land was purchased by A. under that agreement, or in case that claim failed to recover the damages incurred by him in consequence of A.'s failure to make the payments therein provided for. The complaint after stating the facts showing the execution and delivery of the original option of B., its transfer to A., and the extension thereof by C., alleged a purchase of the property by A. within the life of the extension and in accordance with the terms of the option, and his liability for the amount therein provided to be paid, and demanded judgment for \$53,500. The second count was a substantial repetition of the first. The third stated a cause of action founded upon an alleged promise by defendant to pay the plaintiff \$50,000 as a consideration for the transfer by plaintiff to defendant of said agreement, and also demanding judgment for \$50,000. The answer denied that defendant purchased the premises on account of or pursuant to any arrangement with plaintiff, or pursuant to the option mentioned in the complaint, but alleged that the purchase was made entirely independent of and free from the operation of said option. The court found that plaintiff was not entitled to recover in that action.

*William F. Cogswell*, for applt.

*George B. Bradley*, for respt.

*Held*, That the judgment in the action brought in the fall of 1870 was a bar to this action. 1 Johns. Cas., 436; 3 N. Y., 511; 77 id., 76; 85 id., 428. That this action could not be supported on the

ground of fraud, as the plea of the statute of limitations furnishes a bar. That A. in making the purchase in question violated no contract obligation or duty owing to the plaintiff which would prevent him from acquiring a valid title to the lands through a purchase and conveyance from C., their lawful owner. 62 N. Y., 406. This action cannot be maintained on the theory that R. had a legal or equitable interest in the property at the time of the transfer to A., as no such interest existed. This is not a case for the application of the doctrine of a constructive trust.

Judgment of General Term, reversing an interlocutory judgment for plaintiffs, affirmed.

Opinion by *Ruger, Ch. J.* All concur, except *Earl* and *Finch, JJ.*, dissenting, and *Danforth, J.*, not sitting.

## PLEADING. SUPPLEMENTAL ANSWER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Leopold Lithaner, assignee, *respt.*, v. Robt. Taggart et al., *appls.*

Decided May 29, 1884.

In an action by a general assignee for conversion of goods of his assignor when, after the service of an answer, the goods in question are removed from the possession of the defendant by a levy and sale under an execution issued upon a judgment obtained against plaintiff's assignor, the defendant should be allowed to serve a supplemental answer setting up that fact, and he also becomes subrogated to the rights of the judgment creditor and is entitled to contest the validity of the assignment.



Appeal from an order of Special Term, denying motion for leave to serve a supplemental answer.

This action was brought by the general assignee for the benefit of creditors of the firm of Dodge & Sinclair, for conversion by defendant of certain goods belonging to said firm. After the service of the answer the goods in question were removed from the possession of defendant by virtue of a levy and sale under an execution issued upon a judgment obtained against said Dodge & Sinclair, and defendant subsequently moved to be allowed to serve a supplementary answer setting up such fact, and also that the assignment to plaintiff was made to delay and defraud creditors. This motion was opposed by plaintiff upon the ground that the subsequent removal of the goods from defendant's possession constituted no defense to an action for their previous conversion, and that defendant had no right to attack the assignment, and the motion was denied.

*Edward P. Wilder*, for appls.  
*Albert Cardozo*, for resp't.

*Held*, That if, as alleged, defendant has been compelled under the process of the court to apply the goods in payment of the debt of a judgment creditor, in equity he has a right to be subrogated to the rights of the judgment creditor, and as such judgment creditor he would have the right to contest the validity of the assignment.

That while it is true that the removal of the goods from the defendant's possession would not

constitute a defense for the conversion, plaintiff under the assignment is not the owner of the goods in his own right, but as trustee for the creditors of his assignors; and if the goods which he seeks to recover and which he alleges that defendant has converted have subsequent to such conversion been applied in the payment and satisfaction of the claims of the creditors, there is no reason why that fact may not be properly considered in mitigation of the damages. 48 N. Y., 6.

Order reversed.

Opinion by *Haight, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

#### GUARDIAN. EMBEZZLEMENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

George F. Bingham, *applt.*, v.  
Francis X. Beckwith, *resp't.*

Decided May, 1884.

A guardian who occupies his ward's real estate becomes indebted for the reasonable value of such occupation, but the nonpayment of such sum does not constitute embezzlement within Ch. 208, Laws of 1877.

In an action for malicious prosecution, where the facts are undisputed, the question of probable cause is for the court.

Appeal from order denying motion for new trial on the minutes.

Action for malicious prosecution, in which the jury gave verdict in defendant's favor. Plaintiff was appointed guardian of one H., an infant, and acted as such until Dec., 1878, when he was removed. He was called to an accounting

before the surrogate, who, in 1879, decreed that there was due from him \$655.92. This sum plaintiff neglected to pay, and defendant, who was surety on plaintiff's bond as guardian, instituted criminal proceedings against plaintiff, charging him with embezzlement of his ward's moneys. The grand jury dismissed the charge, and this action was thereupon begun. The criminal prosecution was based upon alleged violation of the provisions of Chapter 280 of the Laws of 1877. Defendant proved without dispute that plaintiff, while guardian, occupied lands of his ward, and that the surrogate fixed the value of such occupation at the sum of \$152, which was embraced in the decree against plaintiff. The judge charged the jury that the omission to pay the value of the use and occupation for the period embraced after the Act of 1877 constituted embezzlement within the meaning of the act; or at least he left it for the jury to say whether the failure to pay the rental value did not come within the meaning of the statute.

*J. A. Adlington*, for applt.

*J. Sullivan*, for respt.

*Held*, Error. The nonpayment of rental value was not a conversion of money, goods, rights of action or effects, so as to constitute embezzlement within the meaning of the statute.

The facts being undisputed, the question of probable cause is a question of law for the court to determine. 1 T. R., 493; 10 N. Y., 236; 2 Wend., 424; 7 Cowen, 715; 98 U. S., 194; 81 N. Y., 428.

Order reversed, verdict set aside and new trial ordered in county court, costs to abide event.

Opinion by *Barker, J.; Smith, P. J.*, and *Hardin, J.*, concur.

## JURISDICTION. WAIVER.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Lizzie A. Edwards, respt.*, v. *The Berkshire Life Ins. Co., applt.*

Decided May, 1884.

Defendant's answer set up as defense that both parties are non-residents and the case is not within § 1780, Code Civ. Proc. Four months later defendant gave notice of motion to dismiss on the same ground. *Held*, That a denial of the motion without prejudice to defendant's right to raise the question on the trial was right.

Appeal from Special Term order, denying motion to dismiss the action for want of jurisdiction.

The ground of the motion is that both parties are non-residents and the case is not within the provisions of § 1780, Code of Civ. Proc. The action was begun in July, and on August 9th defendant appeared and answered, setting up as one defense the same matter upon which the motion is based. On December 10 notice of the motion was given. The Special Term denied the motion without prejudice to defendant's right to raise the question on the trial.

*W. M. Brown*, for applt.

*Wm. N. Cogswell*, for respt.

*Held*, That whether or not the question could have been properly presented by motion seasonably made, doubtless it may also be

raised by answer, and defendant having resorted to that method, he should be regarded, in view of the delay since the answer was interposed, as having thereby waived the remedy by motion.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Bar-ker, J.*, concurs. *Hardin, J.*, not voting.

### LIFE INSURANCE. EVIDENCE. ESTOPPEL.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

James D. Ferguson, *respt.*, v. The Massachusetts Mutual Life Ins. Co., *applt.*

Decided April, 1884.

Where an insurable interest exists at the time of taking out a policy on the life of a debtor, the creditor paying the premiums, the subsequent payment of the debt in whole or in part or the discharge of the debtor in bankruptcy will not invalidate the policy or furnish a defense to it.

Evidence of the party procuring the policy as to the health of the assured is admissible on the question of breach of warranty.

A physician is not allowed to disclose information acquired while attending a patient professionally.

Appeal from judgment in favor of plaintiff entered on verdict, and from order denying motion for a new trial on the minutes.

Action on a policy of insurance on the life of A. S. F., plaintiff's brother, issued by defendant in Jan., 1870. The answer, besides a general denial, set up fraud, breaches of warranty, etc., a total want of insurable interest prior to, at and after the issuing of the pol-

icy. Defendant admitted its incorporation, the issuing of the policy, death of A. S. F., and delivery of the proofs of death.

The reply alleged that an action was brought in 1871 to set aside this policy on substantially the same grounds alleged in the answer, and that judgment was rendered therein in favor of this plaintiff, and that thereafter defendant received premiums on said policy.

It appeared that in 1867 plaintiff and one B. were indorsers on a note for \$6,000, made by A. S. F., which was protested, and plaintiff was obliged to take it up and held it down to January, 1870. In March, 1868, plaintiff and B. recovered judgment on said note against A. S. F. Plaintiff had also a claim against A. S. F.

Some evidence was given as to a compromise arrangement in 1866, but this was contradicted.

The court held that if plaintiff had an insurable interest at the issuing of the policy that was sufficient. Defendant offered to show that at the time of the death plaintiff had no insurable interest, which was excluded, as was also as offer to show the discharge of A. S. F. in bankruptcy, in April, 1868.

Defendant moved for a nonsuit on the grounds, 1, that there was a breach of warranty as to the health of A. S. F., and 2, that plaintiff had no insurable interest in the life of A. S. F. either at the time the policy was issued or at the time of his death, and offered the premiums back. Motion de-

nied. The court then ruled that under the policy plaintiff must have had an insurable interest of \$5,000 when the policy was issued, and the jury must so find; if less than that sum the policy would be vitiated.

The jury returned a verdict for the plaintiff.

*Alex. Coburn*, for applt.

*Francis Kernan*, for respt.

*Held*, No error; and that it could not be said that the verdict was against the weight of evidence on the question of insurable interest when the policy was issued.

That the partial payment of the debt in the lifetime of A. S. F., his discharge in bankruptcy or a full payment of the debt, if made out by the evidence, would not have constituted a defense to plaintiff's claim on the policy or any part thereof. That this question was not decided in 22 Hun, 325, although a dictum thereon in favor of defendant appears in the opinion of the court; but the cases referred to do not bear out the expression. They were cases referring to fire insurance policies, and do not all support the dictum. It must be borne in mind that the premiums were all paid by plaintiff with his own money, and that he was in no sense acting for A. S. F. in such payments. Plaintiff's application for the policy was independent of Amos. It was bargained for by plaintiff without any agreement whatever with Amos in regard to it. It is inferable that plaintiff paid in premiums just as much as defendant would have charged A.

S. F. for a policy on his own life. Besides, the stipulations of the policy have no reference to the creditor's claim upon the debtor. The policy is not in terms made collateral to the creditor's debt, as in the case of fire policies. There being a debt at the time the policy is issued it is then valid. It contains no condition referring to the continuance of the indebtedness. But, on the contrary, the policy evidences a flat and positive promise to pay a given sum at the termination of the life named. Death removes the last condition precedent, except perhaps the delivery of proofs of death.

No statute has gone so far as to declare that a life policy, valid in its inception because of a creditor's interest in the life of his debtor, shall be invalid the moment the debt is paid. 73 N. Y., 497. Besides, from the nature of the contract which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor, he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy.

That an insurer is bound to fulfil its contract, valid in its inception, notwithstanding the debtor upon whose life it was may have paid his creditor or obtained a discharge in bankruptcy. 28 Eng.

L. & Eq., 312; 36 Barb., 357; 27 N. Y., 282; 3 Kern., 31, 41n; 85 N. Y., 598; Bliss on Life Ins., § 30; May on Ins., §§ 115, 116.

That a payment of the policy by the company in a case where the debt has been paid would not be a second payment of the debt. The company simply observes its contract to pay a stated sum of money, in return for premiums received, as soon as the death happens, which is the only event named in its contract, which must occur before its promise becomes absolute.

*Babcock v. Bonnell*, 10 W. Dig., 158; 80 N. Y., 244, distinguished.

*Also held*, That it was competent for plaintiff to show that there had been no breach of warranty. In doing so it was proper to receive evidence from plaintiff "as to the health of the party whose life is insured \* \* as to his health prior to the application for the policy." 27 N. Y., 282. If plaintiff knew of nothing to indicate that A. S. F. was not in good health the warranty was not broken, even though there were germs of disease. 92 N. Y., 274.

By the finding of the jury, on conflicting evidence, as to the interview between plaintiff and defendant's agent, it appears that plaintiff paid back and subsequent premiums upon the assurance that there would be no more trouble, and that when plaintiff's brother died the money would be ready, and he would get his \$5,000. The court had charged that to find for plaintiff on this issue the jury must find that defendant had

knowledge of the facts alleged to constitute the breach of warranty.

*Held*, That under such a finding the company were estopped from further litigating the validity of the policy. 19 Barb., 440; 38 id., 402; 42 N. Y., 557; Herman on Estoppel, §§ 467, 548; 26 Pa., 199; 49 Me., 200; 83 N. Y., 169.

The evidence of Dr. W., based on information derived from the deceased while under treatment by him, was excluded.

*Held*, No error. Information acquired while attending a patient professionally is privileged, and a physician is not allowed to disclose it. Defendant could not waive the objection to it. Code Civ. Pro., § 834; 67 N. Y., 185; 28 Hun, 430; 92 N. Y., 275.

*Also held*, That there was no error in receiving in evidence the premium receipts issued to plaintiff. They furnished evidence of the amount of money defendant had received from plaintiff.

Judgment and order affirmed.

Opinion by *Hardin, J.*; *Smith, P. J.*, and *Barker, J.*, concur.

## JURORS. CHALLENGE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Alanson Mullen, infant, by guardian, *respt.* v. Asbury Christian and George W. Decker, *appls.*

Decided May, 1884.

Where the examination of a juror clearly warrants the conclusion that in an action like the one to be tried he would require stronger evidence to find for the plaintiff

than in other cases, a challenge for favor should be sustained.

Appeal from judgment on verdict at circuit and from order denying motion for new trial on the minutes.

Action under the civil damage act for injury to plaintiff in his means of support, in consequence of the intoxication of his father, caused by liquor alleged to have been sold to him by defendant Decker, who, it was alleged, occupied premises belonging to defendant Christian, with the permission of the latter and with his knowledge that intoxicating liquors were to be sold therein. At the trial defendant excepted to a decision of the court sustaining plaintiff's challenge for favor to one Cole, who was called as a juror. Cole testified, on his examination by plaintiff's counsel, that he was a hotel-keeper; that he should require stronger evidence in such a case than in others; that he might be prejudiced and might not; that he didn't know but he would, and didn't know as he would. He also testified, "I don't believe I should be as impartial in such a case as this." On being examined by defendants' counsel, he answered as follows: "Q. If you knew a hotel-keeper had violated the law, morally or legally, would you convict him? A. If the proof was strong enough, I shouldn't hesitate. Q. If you were satisfied that the evidence was from creditable witnesses, would you not convict the defendant? A. Yes, sir, if the evidence satisfied me."

*Thomas M. Howell*, for appls.  
*E. W. Gardner*, for respt.

*Held*, That Cole's entire testimony clearly justified the conclusion that in an action under this statute he would not be an impartial juror, and that in order to find for the plaintiff in such an action he would require stronger evidence than in other cases. On that ground the challenge was properly sustained. Besides, the rejection of a competent juror is not ground of error where the jurors who try the cause are competent, as seems to have been the case here. 18 W. Dig., 156.

Defendants' contention that the verdict is against the weight of evidence cannot be sustained.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

## MARRIAGE. DOWER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Constance V. Price, *applt.*, v.  
Walter J. Price, *respt.*

Decided May 9, 1884.

When a man who has been previously married, but who has not heard for five successive years that his wife is living, marries a second time, and it is subsequently discovered that his first wife was living at the time of his second marriage, and, in an action brought for that purpose, such second marriage is decreed to be void from the time of entering the decree, and the man subsequently dies, his second wife is entitled to dower in the real estate of which he was seized at the time between his second marriage and the entry of the decree declaring it void.

It is only where the decree annuls the mar-

riage from its solemnization that it is attended with the effect of depriving the wife of her right to dower in the property owned by her husband during the existence and continuance of the marriage.

Cases may arise under the law as it is now administered in this State where two or more persons may be entitled to dower in the same estate.

Appeal from a judgment entered upon the report of a referee.

The action was brought for the recovery of dower in real estate of which Walter W. Price was seized during his lifetime. He intermarried with plaintiff on the 1st of July, 1865. He had previously been married, but more than five years had elapsed before his marriage with plaintiff since he had heard that his former wife was living. He subsequently discovered, however, that his former wife was living at the time of his second marriage, and, in 1873, he commenced an action against plaintiff in which a judgment was recovered decreeing his marriage with her to be void from the date of the entry of the decree, and some time thereafter he died.

*Charles Jones, Geo. H. Starr, and Thomas Hooker, for applt.*

*Hughes & Northrup, for W. J. Price.*

*James R. Marvin, for deft. Little.*

*Bristow, Peet & Opdyke, for F. N. Price et al.*

*S. Brown, for Lillie M. Price.*

*Held,* That at the time when the marriage between plaintiff and Price was solemnized it was a lawful marriage, and continued to be so to the time when its nullity was pronounced by the judgment

above mentioned, 3 R. S., 6th ed. 148, § 5, and during that time plaintiff was the lawful wife of Price, and those facts were sufficient, in judgment of law, to entitle her to dower in the real estate of which he was seized during said time. 4 Com., 95.

That it is only where the decree annuls the marriage from its solemnization that it can be attended with the effect of depriving the wife of her right to dower in the property owned by her husband during the existence and continuance of the marriage. 1 Sharwood's Blackstone, 440; 4 Com., 95.

*Boddington v. Clariatt, Law Repts., 22 Ch. Div., 597, distinguished.*

That the fact that the husband's estate might in this manner be subjected to the right of more than one person to dower in it could not be allowed to operate to the prejudice of plaintiff. That may very well be, as the law is now administered in this State; for a wife obtaining a divorce from her husband for his adultery would be entitled to dower, and so would another who might survive him who should be married to him afterwards in one of the other States, and, in this manner, not only two wives might lawfully claim dower, but, if their number in a similar manner should be still further increased, each of them would be permitted to assert and maintain the same claims.

Judgment reversed and judgment entered awarding dower to plaintiff.

Opinion by *Daniels, J.; Davis, P. J.*, and *Brady, J.*, concur.

### PRACTICE. EXCEPTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John B. Gossler, *respt.*, v. Lazarus Lissberger, *applt.*

Decided May 29, 1884.

When the judge's charge contains a misdirection in the law of the case and injustice may probably have resulted from it the Appellate Court is required to set aside the verdict and direct another trial of the action, although no exception may have been taken.

Motion for reargument.

An order setting aside the verdict in this case and directing a new trial was affirmed by the General Term on account of an error of law in the charge of the judge upon the trial, and the motion for reargument was based upon the ground that the exception taken to such charge did not include the point upon which the order was affirmed.

*Austin G. Fox*, for *applt.*

*F. R. Minrath*, for *respt.*

*Held*, That even if the exception could be so restricted in its effect as not to include the point upon which the case was decided, it would not result in a reversal of the order, for there would still be a misdirection in the law of the case, and when that may appear to be the nature of the charge and injustice may probably have resulted from it, the court is required to set aside the verdict and direct another trial of the action, al-

though no exception may have been taken. 4 T. & C., 690; 65 Barb., 92, 105; 15 Hun. 293, 295; 6 Hun, 476; 8 Hun, 171; 23 Hun, 218; 79 N. Y., 506, 510.

Motion denied.

Opinion by *Daniels, J.; Davis, P. J.*, and *Brady, J.*, concur.

### TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

George H. Fulton v. George C. Edgar.

Decided May 9, 1884.

Testator devised his real estate to his executors in trust to sell the same and invest the proceeds and apply the income derived therefrom to certain purposes, and at a certain time to divide such proceeds between plaintiff and certain other beneficiaries. The executors omitted to sell the real estate, but at the time named, with the consent of the beneficiaries, divided the real estate itself among them, giving them proper conveyances therefor. *Held*, That plaintiff acquired a good title to his share of said real estate, and could convey the same.

If money is directed by a will or other instrument to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may, in either case, if he elects so to do, prevent any conversion of the property from its present state and hold it as it is.

Case submitted upon an agreed state of facts.

Plaintiff's father, by his will, devised his real estate to his executors in trust to apply the proceeds thereof to the support, etc., of his widow; and after her death or marriage to sell the same and invest the proceeds thereof and pay over the interest derived from



one-half of such proceeds to his daughter; and that derived from the remaining one-half to plaintiff; and, after the decease of his daughter, to give one half of such proceeds to her issue surviving her; and, upon the plaintiff's attaining the age of thirty years, to pay over to him his one half of such proceeds. The executors did not convert the real estate into money, but held the same and managed it for the benefit of the beneficiaries under the trusts created by the will until after the time fixed for its final distribution; and then, with the consent of all the beneficiaries, divided such real estate, by proper conveyances, between them. Plaintiff subsequently contracted to sell a portion of the real estate so acquired by him to defendant, who refused to complete his purchase upon the ground that a good title could not be conveyed.

*George S. Hamilton*, for plff.

*Joseph Fettrich*, for resp't.

*Held.* That the law is settled that, if money is directed by a will or other instrument to be laid out in land, or land is to be turned into money, the party entitled to the beneficial interest may, in either case, if he elects so to do, prevent any conversion of the property from its present state and hold it as it is. 12 Barb., 113, 117; 69 N. Y., 1, 11; 3 Wheat., 563.

*Morse v. Morse*, 85 N. Y., 53, distinguished.

That within the operation and effect of this rule, the executors, with the assent of all the parties

interested in this estate, could lawfully divide the property between them by making acceptable conveyances, as they did, to them respectively; and under that made to the plaintiff a legal title was acquired by him to the property which he agreed to convey to defendant, and he could convey a good title thereto.

Judgment for plaintiff.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## NEGLIGENCE. MASTER AND SERVANT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Charles Olsen, applt.*, v. *William P. Clyde, resp't.*

Decided May, 1884.

Although the peculiar relations of the common seaman to his superior officers may relieve him from being charged with contributory negligence in obeying an order which exposes him to peril, yet the effect of these relations does not extend so far as to enable him to recover for the negligence of a co-employee.

Though the master of a vessel may be the *alter ego* of the owners, the mate, while the master is on board, is not such *alter ego*, and though of superior grade with power to compel obedience, he is yet a fellow-servant with the common seaman, and for his negligence the seaman cannot recover against the ship-owner.

Appeal from judgment sustaining demurrer to plaintiff's complaint.

Action to recover for injuries received by plaintiff while in defendant's employ as a seaman.

*Adolphus D. Pape*, for appellant.

*Boardman & Boardman*, for respondent.

*Held*, That in the absence of personal knowledge shown, it does not follow that inasmuch as the master was on deck at the time his assent to and approval of the negligent order of the mate must be assumed. That if in fact the master heard the order, and by silence ratified it, that should have been distinctly alleged by the pleader if deemed material.

That although the peculiar relations of the common seaman to his superior officers may relieve him from being charged with contributory negligence in obeying an order which exposes him to peril, yet the effect of these relations does not extend so far as to enable him to recover for the negligence of a co-employee.

That though the master of a vessel may be the *alter ego* of the owners, the mate, while the master is on board, is not such *alter ego*, and though of superior grade, with power to compel obedience, he is yet a fellow-servant with the common seaman, and for his negligence the seaman cannot recover as against the owner of the ship. 25 N. Y., 565.

Judgment affirmed.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

George Schwandner, admr.,

*applt.*, v. *Martin H. Birge et al.*,  
*respts.*

Decided May, 1884.

A lad of 19 years was employed in a paper factory; his work took him into all parts of the factory, which was five stories high, and had no way of access to the scuttle in the roof. The factory burned, and the boy, who was then in the fifth story, perished. *Held*, That the question of negligence was for the jury.

Appeal from judgment of nonsuit ordered at circuit.

Complaint for negligently causing the death of plaintiff's intestate, an employee in defendant's wall paper factory. The factory was burned and intestate lost his life in the flames. The factory was a five story brick building. Deceased was 19 years old, healthy, worked every day, lived with his parents, and contributed his earnings to their support. He had no stationary place of employment in the factory; his work was on every floor and in every part of the factory, carrying away scraps of paper. About half an hour before the fire broke out deceased was seen on the fifth floor and was not afterward seen alive by any of the witnesses. The alleged negligence consisted in not providing sufficient means of escape from the fifth floor in case of fire, and particularly in not furnishing means of access to the scuttle in the flat roof which was immediately over the fifth floor and 11 feet above it. The fifth story was divided into two rooms by a partition. In each room was an elevator, but they were not used as a means of passage by the workmen. In the front

room was a staircase descending to the fourth floor, and from that floor two staircases led to the ground floor. In the rear room was an iron door opening on to the flat roof of Tift's pattern house, but egress by that door was impeded somewhat by iron wheels piled against it. The fifth story was the drying room, and in it was hung a quantity of dried and drying paper. When the fire broke out there were about twelve boys in each room on the fifth floor. Of those in the front room only one escaped through the iron door and one went down the stairs; all the others in the front room were lost. All who got upon Tift's roof escaped, and none were lost who were on any other floor than the fifth.

*Adelbert Moot*, for applt.

*James M. Humphrey*, for respts.

*Held*, We think the evidence required the submission to the jury of the question whether the omission to provide a suitable means of access to the scuttle was negligence on defendant's part, and whether such omission, if negligent, caused the intestate's death.

The fact that the intestate knew there was no staircase or ladder was not, under the circumstances and as matter of law, conclusive of want of due care on his part. 7 Hurlst. & Nor., 937; 102 Mass., 572. The danger here was not a natural or ordinary risk incident to the employment, which it can be presumed that the boy took into consideration when he entered the employment.

The proof justifies the inference that deceased came to his death by reason of the fact that he had no way of escape, and not from any want of care on his part. 20 N. Y., 65; 63 id., 643; 78 id., 310; 80 id., 622; *Mahany v. City of Buffalo*, 4th Dept., Dec. 1881, not reported; S. C. aff'd., 91 N. Y., 657; 12 R. I., 447.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Smith, P. J.*; *Hardin, J.*, concurs; *Barker, J.*, not voting.

#### MUTUAL BENEFIT ASSOCIATIONS. BENEFICIARIES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

George B. Bown, admr., with will annexed, *respt.*, v. The Supreme Council of the Catholic Mutual Benefit Association, impld., *applt.*

Decided May, 1884.

The "Beneficiary Fund" of an association organized under Ch. 496, Laws of 1879, does not become a part of the property or estate of the person insured after his death, and does not go to his administrator under the charter and by-laws of the association.

Appeal from judgment on referee's report.

Decedent died a member in good standing of defendant, a beneficiary association organized under Chapter 496, Laws of 1879. By the terms of its charter and by-laws, upon the death of a member, his family or heirs or representatives or such person as he should

designate was to be paid \$2,000. Such fund was expressly provided to be exempt from execution, and not to be liable to be taken by legal or equitable process to pay any debt of such deceased member. The deceased, in full compliance with the by-laws, made an order that, upon his death, the beneficiary money should be paid to his brother Patrick. Afterwards he made his will providing: "After payment of any just debts and funeral expenses, I give, devise and bequeath to my brother Patrick all my interest in The Catholic Benefit Association, amounting to two thousand dollars, to have for his own use and benefit for ever." The judgment was for \$2,000 with interest and costs.

*D. C. Feely*, for applt.

*Rowley & Johnston*, for respt.

*Held*, That the charter and by-laws of defendant constitute the terms of an executory contract, to which deceased assented when he became a member of the society, and upon which plaintiff's right of action depends. 18 W. Dig., 421; 44 Md., 424; 29 Ohio, 557.

The fund could not be claimed by decedent's executor or administrator as an asset belonging to his estate, nor made liable for payment of his debts. It was no part of the scheme to benefit the estate of a member while living, or to increase it after his death. 46 Mich., 429.

The will does not in terms revoke the former designation of a beneficiary, nor was such the testator's intention. He did attempt to make the fund subject to payment of

his debts, but that he could not do.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Barker, J.*; *Smith, P. J.* and *Hardin, J.*, concur.

### FORGERY.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Frederick C. Fadner, *plff. in error*, v. The People, *defts. in error*.

Decided May, 1884.

An instrument which is invalid on its face cannot be the subject of a forgery.

Fadner was convicted of forgery at the Court of Sessions. The indictment charged defendant with having uttered a false and forged impression of the Seal of the Supreme Court in and for the County of New York, with intent to defraud, knowing the same to be a forgery. The impression was made on the back of a paper writing purporting to be a decree in a divorce suit. To the right of the impression are the words: "Final. August 14th, 1879." "A Copy." "Hubert O. Thompson, clerk." Nothing else appears near the seal or signature. The paper purports to be a decree in a suit wherein this defendant was plaintiff, and Alta Fadner was defendant, and it was offered and received in evidence in the Court of Sessions on the trial of defendant for bigamy. The evidence tended to show that the decree was wholly false and fabricated, and that there

was no record of the same in the clerk's office; and that the alleged counterfeit impression was in form like the original seal, but was false and counterfeit.

*J. I. Sayles*, for plff. in error.

*Wm. A. Matheson*, Dist. Atty.

*Held*, We do not decide whether the utterings of the false impression of the seal of a Court of Record constitutes the crime of forgery, but assuming that it does, forgery is not made out here. The certificate, if genuine, is clearly defective in form and substance. The defect is fatal to its validity, and is apparent on its face. It ought not to have deceived any one. Code, § 933, 957, 958; 9 Cow., 778; 1 Wend., 198; 21 id., 409; 8 Barb., 560; 4 Hun, 455; 2 Bish. Cr. L., § 538; Whart. Am. Cr. L., § 1438.

Judgment reversed, new trial granted.

Opinion by *Barker, J.*; *Smith, P. J.*, and *Hardin, J.*, concur.

#### PRACTICE. ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Josiah Partridge, applt.*, v. *William Brown, respt.*

Decided May, 1884.

Where, in an order of attachment, plaintiff's affidavit did not show that an action had been begun and that a summons had been issued, and did not state facts from which fraud could be inferred, except upon information and belief, at the same time failing to show the informants, *Held*, That the omissions were fatal.

Appeal from an order vacating an order of attachment.

The affidavit did not show that an action had been begun, and that a summons had been issued. It did not state facts from which fraud could be inferred, except upon information and belief, failing, however, to show the informants.

*Man & Parsons*, for applt.

*Wm. J. Gaynor*, for deft.

*Held*, That these omissions were fatal to the existence of the order.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs; *Barnard, P. J.*, dissents.

#### WILLS. UNDUE INFLUENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Tristram Coffin, v. Georgianna Lattin.*

Decided Feb., 1884.

Where a testator is shown to have been competent, and where no suspicious circumstances were attendant on the execution of her will, the mere fact that out of a total estate of \$49,000, \$9,000 was bequeathed to one of the executors who had been for years the testator's legal adviser, is not sufficient to justify a decree refusing to admit that will to probate.

Appeal from decree of Surrogate, refusing probate of certain portions of a will.

The testator was shown to have been in good health, of sound mind and memory and perfectly competent to transact business. Out of an estate of \$49,000, she bequeathed \$9,000 to one of her executors who had been for years her legal adviser. The will was in her own hand-writing, and the leg-

atee was not present at the execution, and abundant proof was given that the will spoke the true wishes of the testator.

*S. W. Fullerton*, for applt.

*J. S. Van Cleef* and *M. A. Fowler*, for respt.

*Held*, That there is no rule which forbids a testator to evince appreciation of faithful advice and service, even though it be that of a lawyer. That the argument that the testator may have been influenced by the fact that loans advised by the legatee had turned out well is really in support of the will as made, in that it shows that the testator had reasonable ground to make these legacies complained of.

Decree reversed and a jury trial ordered in accordance with § 2588 Code.

Opinion by *Pratt, J.*; *Bernard, P. J.*, and *Dykman, J.*, concur.

## WILLS. EXECUTION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*In re* probate of the last will of John Russell, deceased.

Decided May, 1884.

Where proponents of an alleged lost will failed to give any evidence that the paper was duly executed as a will, although the deceased declared it to be his will, *held*, that proponents failed to make out a *prima facie* case.

Appeal from Surrogate's decree refusing probate.

Proponent attempted to establish an instrument as a lost will, and no copy of it was put in evidence. Witness Rabb stated that

about a year before the death of the deceased witness was at the law office of H., who has since died; that Russell was there, and witness saw a paper of four pages, partly written and partly printed, lying on his table, which Russell said was his will; that witness saw Russell's name and seal at the end of the paper, and under Russell's name there was a space filled with written or printed matter, and under that, at the left hand of the paper, were two or three names, one of which witness thought was H's.; the other names he did not testify to. He also testified that the paper was in H's handwriting, and that H. was present when witness saw the paper, but made no remark about it, and that Russell said H. was to be executor of the will.

*Nash & Lincoln*, for petr. applt.

*Allen & Thrasher*, for contestants, respts.

*Held*, The record, as it stands, contains no evidence whatever that the paper testified to by Rabb was duly executed as a will. The bare declaration of deceased that it was his will does not tend to prove that it was executed as the statute requires. To hold otherwise would be to dispense with all the safeguards against fraud and imposition which the formalities required by statute were intended to provide.

Decree affirmed, with costs of respondents to be paid out of the estate.

Opinion by *Smith, P. J.*; *Har- din* and *Barker, JJ.*, concur.

# NEGLIGENCE. MASTER AND SERVANT. MINORS.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

Thos. Hayes, *respt.*, v. The Bush  
& Denslow Mfg. Co., *applt.*

Decided May, 1884.

In an action brought by a minor under 16 years of age, for damages received from personal injuries while in the employ of the defendants in an occupation alleged to have been dangerous, the Court refused to charge "that if the plaintiff was negligent he could not recover." *Held*, No error.

Appeal from a judgment entered on trial at Circuit.

Action to recover damages for personal injuries. Plaintiff was a minor under sixteen years of age, and was employed by defendant in a business alleged to be dangerous. The Court refused a request to charge that if plaintiff was negligent he could not recover.

*Charles J. Patterson*, for *respt.*

*T. F. Hascall*, for *applt.*

*Held*, No error; that the illegal act of defendants in employing a minor under the age of sixteen in a dangerous occupation, and not its negligence, is the basis of the action.

That lack of negligence, therefore, on the part of defendant would be no defence. Therefore to have charged as defendant requested, that if plaintiff was negligent he could not recover, would have been to have ignored the distinction between the degree of care required from an infant and from a person of mature years. An infant is required to use only such care and discretion as may reason-

ably be expected from one of her years and comparative inexperience. To have charged the jury in the broad language of the request would have been error.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

## JUSTICES COURT. PLEADING.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Lydia A. Green, *applt.*, v. Dennis C. Waite, *respt.*

Decided May, 1884.

Where, in justice's court, matter is set up as a defense and not as a counter-claim, it must be regarded as a defense only.

Appeal from County Court order denying plaintiff a new trial in that Court and striking the cause from the calendar.

Plaintiff sued defendant in justice's court on contract. Judgment was rendered in defendant's favor for costs, and plaintiff appealed to County Court, and in her notice of appeal demanded a new trial in the Appellate Court, which was refused by the order appealed from. The only question is whether the sum for which either party demanded judgment in the justice's court exceeds \$50. The complaint demanded judgment for \$31.50 besides costs. The defense upon which the question arises was as follows: "The said defendant, for a fifth and further answer and defense, alleges that said plaintiff is indebted to him in the

sum of \$100, for money paid to and advanced for the plaintiff's use, and for goods sold and delivered to her at divers times within the past six years." The answer concluded: "Therefore, the defendant demands judgment that said complaint be discontinued with costs."

*O'Brien, Emerson & Ward*, for applt.

*Lansing & Rogers*, for respt.

*Held*, That the defense does not set up a counter-claim for \$100. Defendant does not demand judgment in his favor for any sum whatever. Pleadings in justices' court should be so expressed as to enable a person of common understanding to know what is intended. Code C. P., §2940. See *id.*, §2941.

In courts of record where matter which may constitute either a defense or a counter-claim is pleaded simply as a defense, or without designating it either as defence or counter-claim, it will be treated as a defense merely. 5 Duer, 379; 37 N. Y., 409; 44 Barb., 363; 12 Hun, 247; S. C. affd., 75 N. Y., 511. The same rule should apply in justice's court.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### EQUITY. CONTRIBUTION. LIMITATION.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

*Benj. L. Hoyt et al.*, admsrs.,

*appls.*, v. *Henry Tuthill et al.*,  
*respts.*

Decided May, 1884.

An action against joint and several obligors for contribution is one of equitable cognizance, and it is not necessary for plaintiff to show that he paid at the express request of defendants.

The obligation being several, the release of one obligor does not discharge the rest.

Where there is both a legal and an equitable remedy, the statute bar applicable to equitable remedies will be applied where the legal remedy is imperfect.

Appeal from judgment on Special Term decision, on trial of an action in equity.

Plaintiff's intestate, one of several obligors and mortgagors, who were jointly and severally bound by the express terms of their obligation, having made payments in the reduction of the mortgage debt, this action is brought against all the other obligors but one, who has been released, to compel contribution. The action was brought more than six and less than ten years after the cause of action accrued.

*Delos McCurdy* and *B. W. Franklin*, for appls.

*W. F. Cogswell*, for respts.

*Held*, The action is one of equitable cognizance. Story's Eq. Jur., §§ 483, 484, 485, and cases cited in notes. Although each defendant's liability is several and may be enforced at law, 2 B. & P., 208, yet when the co-obligors are numerous they may be joined in one suit in equity to prevent multiplicity of suits. 14 Ves., 160; 3 Pomeroy on Eq. Jur., § 1418, and note (1) and cases there cited.

It is not necessary for plaintiff



to show that he paid at the express request of the defendants or either of them. Contribution will be compelled upon the principle that equality is equity, 57 N. Y., 331, and no request is necessary, or if necessary it will be implied.

The release of one obligor did not discharge the others. 1 Pars. on Cont., 6th Ed., 34, 35.

In general, where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar as the former. 15 N. Y., 505; 34 id., 180. But the statute bar applicable to equitable remedies will be applied where the legal remedy is imperfect, 34 N. Y., 180, or where the right sought to be enforced by the equitable remedy is not a mere incident of the right attainable at law, but is distinct from and independent thereof, and not within the cognizance of a court of law. 27 Hun, 335, *affd.* 91 N. Y., 605.

Judgment dismissing complaint reversed and new trial ordered, costs to abide event.

Opinion by *Smith, P. J.*; *Hardin* and *Barker, JJ.*, concur.

#### CLOUD ON TITLE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

George S. Riley, *respt.*, v. Francis A. Schoeffel, *shff.*, et al., *appls.*

Decided May, 1884.

The necessity of a resort to extrinsic evidence, in any event, to show the validity of plaintiff's title to real estate as against a pur-

chaser at an execution sale, gives plaintiff a good cause of action to restrain the sale.

Appeal from judgment ordered at Special Term, overruling demurrer to complaint.

Action to restrain defendants from selling, upon judgment and execution against one M., a half interest in real estate conveyed to plaintiff by M. and one C., upon the ground that such sale would create a cloud upon plaintiff's title. The complaint alleges that in March, 1878, M. and C., who owned the real estate, conveyed it to plaintiff by deed reciting that the conveyance was made in pursuance of an article of agreement executed by the vendors to plaintiff June 1, 1874, at which time possession of the premises was transferred to plaintiff. The deed was recorded May 27, 1878. The judgment against M. was docketed Oct. 19, 1877, and defendants were proceeding to sell thereunder the interest M. had in the premises at that date. The complaint alleged that plaintiff paid the full purchase price to the grantors when he went into possession, but that the deed does not show whether any part of the purchase money had been paid or had become due when plaintiff entered into possession or when the judgment was docketed.

*Jas. S. Garlock*, for *appls.*

*F. L. & J. E. Durand*, for *respt.*

*Held*, That the averments of the complaint, being conceded by demurrer, established a case for a bill *quia timet*. A purchaser

at the sheriff's sale could maintain ejectment against plaintiff, unless the latter could show payment in full of the contract price before the docketing of judgment, and the burden of proof would be on plaintiff, 4 Kern., 477; 36 Barb., 538, and for that he would have to resort to extrinsic evidence. 10 Barb., 454, and cases cited. Plaintiff has good cause of action to restrain the sale. 16 N. Y., 522.

Judgment affirmed, with costs, with leave to defendants to answer on payment of costs of this appeal and of demurrer.

Opinion by *Smith, P. J.*; *Har- din* and *Barker, JJ.*, concur.

#### CORPORATIONS. RECEIVERS.

##### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Phoenix Foundry & Machine Co., *applt.*, v. The North River Construction Co., *respt.*

Decided May, 1884.

The court which appoints the receiver of an insolvent corporation has authority, as an incident to the power of appointment, to prevent any interference with the assets of the corporation by individual creditors or others.

Appeal from Onondaga Special Term order, denying plaintiff's motion to vacate an order granted by a justice of this court in the first district, on notice, in an action in favor of one W. against this defendant.

Defendant is a corporation under the laws of New Jersey, doing

business in this State. On Jan. 14, 1884, W., a stockholder of defendant, brought his action in this court against defendant, in behalf of himself and all other stockholders, and of the creditors of defendant, alleging defendant's insolvency and that a receiver of its assets had been appointed by a New Jersey court, and asking for the appointment of a receiver of defendant's property in this State, which was done by an order of this court at Special Term in the first department, and the receiver duly qualified and entered upon his duties. This action was begun Jan. 19, 1884, the place of trial being laid in Onondaga County. Subsequently, the order from which this appeal is taken was granted upon W.'s application, restraining all persons from bringing or prosecuting any suits or proceedings against defendant or in any way interfering with defendant's assets until further order of the court.

*W. S. Andrews*, for applt.

*C. B. Alexander*, for respt.

*Held*, That the receiver represents the corporation, its stockholders and its creditors, and the court by which he was appointed had authority, as an incident of the power of appointment, to prevent any interference with the assets of the corporation by individual creditors or others, in order to preserve the fund for distribution. 77 N. Y., 272. Such authority may be exercised by an order made in the suit in which the receiver is appointed. *Id.* And a creditor who attempts to interfere with the

fund by unnecessarily subjecting it to the costs of an action to enforce his claim cannot set up that the order is ineffectual as to him because not made in his own action. The order is made in the exercise of the court's inherent power, to protect its receiver and the fund in his hands, and is not a creature of the Code. 2 Story's Eq. Jur., § 891.

This court may, in extreme cases like the present, by an order in one action, restrain proceedings in another pending before it in another district. 45 N. Y., 637, overruling 51 Barb., 368.

The provisions requiring an undertaking to be given on obtaining an injunction order, and that the order shall state the grounds on which it is granted, do not apply to an order like the one in hand.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Hardin, J.*, also reads for affirmance; *Barker, J.*, concurs.

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jacob Anderson, *respt.*, v. Eunice J. Doty, *applt.*

Decided May, 1884.

Where the complaint, which was verified, charged defendant with maintaining a house of ill-fame, *Held*, That defendant might omit a verification from her answer and need not serve with her answer an affidavit stating why she claimed that right.

Appeal from Special Term order, denying defendant's motion re-

quiring plaintiff to receive an unverified answer.

The complaint is verified and alleges that defendant owns and keeps a bawdy house, near three dwelling houses owned by plaintiff, and prays for an injunction in abatement of the nuisance. Defendant served an unverified answer, denying all allegations in the complaint except ownership. Plaintiff served notice that he should treat the answer as a nullity, for want of verification, whereupon defendant made the motion from the denial of which this appeal is taken.

*C. M. Allen*, for *applt.*

*Q. Van Voorhees*, for *respt.*

*Held*, That defendant was privileged to omit verification, by virtue of § 523 of the Code, because she could not be compelled to testify as a witness concerning the allegation that she maintained a house of ill fame. As this appears on the face of the complaint, it was unnecessary that defendant should serve with her answer an affidavit stating the reason why she claimed the right to serve an unverified answer. 5 Abb., 144; S. C., 6 id., 148; 14 How., 151; 13 id., 548.

Roach v. Kivlin, 25 Hun, 150, distinguished.

Order reversed, with \$10 costs and disbursements, and plaintiff required to accept the verified answer.

Opinion by *Barker, J.*; *Smith, P. J.*, and *Hardin, J.*, concur.

LIBEL. VERDICT. EXCEP-  
TION.N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.Samuel D. Hinman, *respt.*, v.  
Wm. H. Hare, *applt.*

Decided May 9, 1884.

A pamphlet was published by a clergyman of the Protestant Episcopal Church, who had been removed from the office of missionary by the Missionary Bishop having jurisdiction over him, addressed to the bishops and clergy of said church, and accusing said Missionary Bishop of unfairness in delaying, &c., a proper ecclesiastical trial of the charges for which he had been removed. In answer to this pamphlet the bishop published another, addressed to the same persons, and justifying his conduct in the matter, and, for the purpose of so doing, reciting charges of immoral conduct against said clergyman which had come to his ears. In an action for libel, *Held*, That the bishop's pamphlet was privileged unless published with malice against the plaintiff and for the purpose of injuring him.

In such a case the court was requested to charge "that if the defendant had probable cause for believing, at the time he issued the pamphlet, the statements charged to be libellous, the plaintiff cannot recover." The court did not so charge. *Held*, No error.

To entitle the court to set aside a verdict for excessiveness, especially in a case in which punitive damages may be awarded, it must be so excessive as to make it apparent that the jury were improperly influenced or that that they must have acted from passion, prejudice, or corruption.

In respect of all questions objected to generally, the exception is valueless where it is apparent or can be reasonably inferred that, if the ground of objection had been stated, it could have been in anywise obviated so that the answer could be made admissible; but where it is clearly apparent that the question relates to an immaterial matter and is of a character wholly inadmissible, irrespective of any objection that could be obviated, there a general objection is the basis of a good exception.

Vol. 19—No. 19a.

Appeal from judgment entered at Circuit and from order denying motion for new trial upon the minutes.

This was an action for an alleged libel, and the defence was that the publication complained of was privileged. Defendant was a Missionary Bishop of the Protestant Episcopal Church. Plaintiff was a clergyman of the same church, and was, for a long time, a missionary within the Episcopal jurisdiction of defendant. He had been removed by defendant from his position as missionary on account of charges affecting his moral character. Subsequently to the removal of plaintiff he demanded an ecclesiastical trial, and steps were taken by defendant, as bishop, for the purpose of procuring such trial. Great delay ensued, and plaintiff claimed that defendant was endeavoring to hinder such trial, and was unfair in the action taken by him for the purpose of constituting the tribunal, and he published a pamphlet, addressed to the bishops and clergy of the Protestant Episcopal Church, complaining of defendant's conduct in the matter. In answer to this pamphlet defendant published another addressed to the same body of readers, defending his conduct, and, for such purpose, reciting the charges against plaintiff which had come to his ears. This was the alleged libel upon which the action was brought. The court upon the trial ruled that its publication having been made as an answer to the pamphlet of plaintiff was privi-

leged to such an extent that no action of libel could be maintained upon it unless it could be established that it was made with malice against plaintiff and for the purpose of injuring him.

*S. P. Nash*, for applt.

*W. H. Arnoux*, for respt.

*Held*, That said ruling was a proper one.

Defendant requested the court to charge "that if defendant had probable cause for believing, at the time he issued the pamphlet, the statements charged to be libellous, plaintiff cannot recover." The court did not so charge and defendant excepted.

*Held*, No error. That the rule in relation to the necessity of plaintiff establishing "want of probable cause" where he brings an action of malicious prosecution has no application to this case. That to some extent it might be applicable, and in some cases has been applied, to actions of libel where the libellous publication consisted in the presentation of charges against the plaintiff to some competent tribunal having jurisdiction of the subject matter of the charges and of the parties for its trial and determination; but there is no reason for applying that rule to the publication of a document sent out as a mere personal vindication to the public at large, or to a portion of the public particularly interested in the matters embraced in the paper.

The jury found for plaintiff a verdict in the sum of \$10,000, and the motion for a new trial was in

part based upon a claim that this verdict was excessive.

*Held*, That the court was not at liberty to disturb a verdict in a case where punitive damages may be awarded merely upon the ground that the damages seem to be excessive in the sense that they are greater than the court sitting as a jury would have assessed. That it must be apparent in such a case, before the court can interfere with the verdict, that the jury were improperly influenced, or that they must have acted from passion, prejudice, or corruption. 1 Den., 207; 8 Hun, 286, and that it was not so apparent in this case.

General objections were taken by defendant to several questions asked witnesses by plaintiff, and it was argued on the appeal that they were of no value because no ground of objection was stated.

*Held*, That the rule is, in respect of all questions objected to generally, that the exception is valueless where it is apparent, or can be reasonably inferred, that, if the ground of objection had been stated, it could have been in anywise obviated so that the answer could be made admissible; but where it is clearly apparent that the question relates to an immaterial matter, and is of a character wholly inadmissible irrespective of any objection that could be obviated, there a general objection is the basis of a good exception. That the objections were good under the above rule, but that the evidence objected to was admissible.

Judgment affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur in the result.

### LIFE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Attorney-General v. The Continental Life Insurance Co. *In re* claim of Francis Gray, admr.

Decided May 29, 1884.

When it has been the custom of an insurance company, for so long and under such circumstances as to warrant a belief on the part of the assured that the custom will be continued, to notify the assured when the premium was payable and the amount of said premium, the policy being one entitling the assured to a share in the dividends of the company applied in reduction of the premiums, the failure of the company to give such notice will excuse the non-payment of a premium when first due, and the policy cannot be forfeited for that reason.

Appeal by Francis Gray, as administrator of the estate of William Tyner, from an order confirming the report of a referee rejecting a claim made for payment on a policy of life insurance issued by defendant.

In 1870 defendant issued a policy of insurance upon the life of William Tyner, of the kind known as participating policies, which entitle the assured to a share of the dividends of the company, to be applied in reduction of the annual premiums. By the terms of this policy the premium was payable on or before the 14th of April in every year, and it was provided that in case the premium should not be paid at that time the pol-

icy should be null and void. The premiums preceding the one which became due on the 14th of April, 1876, were regularly paid, but that was not paid previous to October 25th, 1876, when the company became insolvent, and a receiver of its property and effects was appointed. The assured died in December, 1876, without having paid this premium, and for that reason the claim of his administrator for payment of the policy was resisted. To relieve the case of the effect of this default, it was shown on the part of the claimant that the company had made it a practice to notify the assured of the fact that the premium was maturing, or had become payable, and to send a receipt to the bank, at the assured's place of residence, stating the balance of premium due after deducting the dividends applicable upon it, and the assured was then accustomed to pay the premiums to the bank, which remitted them to the company, and that no notice of the falling due of the premium of April 14, 1876, or of its amount, was sent to the assured.

*Lucius McAdam*, for applt.

*Edward H. Hobbs* and *John C. Keeler*, for respt.

*Held*, That, from the course of dealing which had arisen between the company and the assured, the latter had the right to assume that notice would be given to him of the amount due from him when the company desired this premium to be paid, and that a receipt would be forwarded, etc., as they previously had been, and the fact

that the notice and receipt were delayed beyond the usual period of time would not necessarily have the effect of disturbing this conviction which the circumstances were such as to induce in the mind of the assured, and it would be a fraud upon him and his personal representatives to permit the company to forfeit the policy without notice that it intended to abandon the course previously followed. 96 U. S., 572; 61 Penn., 107; 73 N. Y., 516.

*Atty-Gen'l v. Continental Life Ins. Co.*, 93 N. Y., 70, distinguished.

That the appointment of a receiver of the defendant relieved the assured from further attention to the payment of the premiums, 92 N. Y., 105, and up to that time certainly, for the reasons already stated, no such default existed against him as could legally result in forfeiting the policy.

Order reversed, and order entered sustaining the claim.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

#### CONTRACT. BROKERAGE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Earnest Loffler, applt., v. Lucas Brestenstein, respt.*

Decided May, 1884.

Where plaintiff and defendant agreed that plaintiff was to furnish a purchaser to defendant, which was done, and thereupon the purchaser and defendant entered into a contract for purchase, *Held*, That the contract was one of brokerage; that plaintiff

had performed his service as broker when he produced a customer satisfactory to defendant, and was thereupon entitled to his commission as such. That certain allegations in the complaint did not amount to the allegation of a conditional contract between plaintiff and defendant.

Appeal from a judgment dismissing complaint.

Action to recover commissions as broker in negotiating the sale of a lease, stock and fixtures of a store.

The complaint set out a contract on the part of defendant to employ plaintiff as a broker, and then alleged that a customer was found, who was accepted by defendant, and who agreed with defendant in writing to purchase the property at a fair price that would fix the plaintiff's commission at \$200.

The answer alleged that the sale was conditional on the approval of the landlord of the premises, which was not obtained. The Justice at circuit dismissed the complaint on a preliminary motion.

*George F. Elliott*, for applr.

*John D. Quincy*, for respt.

*Held*, That defendant's duty was performed and the wages earned as soon as plaintiff produced a satisfactory customer who was willing to pay the price asked for the property, and that it could not have been the intention of the parties that plaintiff was to sell the property, give title and receive the money, inasmuch as plaintiff brought the customer to defendant, who entered into the contract to sell. That this plainly shows that the contract between plaintiff and defendant was one of brokerage and so understood by

the parties at the time. That therefore it follows that when plaintiff performed the services of a broker he had earned his money, unless there was some condition in the contract to change this relation.

That the words in the second allegation, defendant agreed to pay plaintiff all the purchase price he obtained in excess of Two Thousand Dollars, mean that defendant would pay all that plaintiff obtained over Two Thousand Dollars, and that when plaintiff had found a customer who agreed to pay Twenty-two Hundred Dollars, plaintiff had obtained two hundred dollars in excess of the price for which defendant was willing to sell. That no condition is therefore alleged in the complaint, and if any existed it was a matter of affirmative defence to be tried in the usual way.

Judgment reversed, new trial granted, costs to abide the event.

Opinion by *Pratt, J.*; *Barnard, P. J.*, concurs; *Dykman, J.*, not sitting.

#### TERMS OF COURT. BONDS.

##### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People, *respts.*, v. Joseph G. Swales et al., *appls.*

Decided May, 1884.

One term of court ends when the next succeeding term begins, and the court cannot, by adjourning one term to the day on which the next begins, so tack the first term to the second as to continue the liability of parties to a bond binding by its terms for the first term.

Appeal from judgment on decision at Circuit upon trial without a jury.

Action on a bond given by Swales as principal and the other appellants as sureties, conditioned that Swales would appear at the next Court of General Sessions, to begin September 9, 1878, and not depart said court without leave. The next term after the September one, began November 11, 1878, and continued till January 25, 1879, on which day, Swales having failed to appear on being called, the bond was declared forfeited and an order was entered to that effect. The bond was given on appeal by Swales from an order of filiation made by two justices of the peace. After the commencement of the November term Swales had appeared, his appeal had been heard, and an order made reducing the amount of weekly payments required by the justices' order, and affirming it as modified, and requiring Swales in open court to give bonds for the child's support, etc. The judge who tried this action found that Swales appeared at the next term of said Court of Sessions after execution of the bond, and departed the said court without leave, and he ordered judgment against defendants for the penalty of the bond. All the defendants appeal. The September term was adjourned to the day on which the November term began.

*Thomas Raines*, for *appls.*

*H. H. Woodward*, for *respts.*

*Held*, That plaintiffs' contention



that by the adjournment the September term was carried into the November term, and was thereafter kept in life by the successive continuances of that term until it was finally adjourned on the day when the bond was forfeited, cannot be sustained. Defendant's obligation did not extend beyond the next term of the court. That term necessarily ended when the term next succeeding it began. A court consisting of only enough judges to hold a single term cannot hold two terms at once. See 5 Hill, 647; 2 Pa., 240. There has been no forfeiture of the bond.

Judgment reversed and judgment ordered dismissing complaint.

Opinion by *Smith, P. J.*; *Har-  
din* and *Barker, JJ.*, concur.

# CONSOLIDATION ACT N. Y. CITY. STATUTORY RE- PEAL.

## N. Y. COMMON PLEAS. GENERAL TERM.

The Mayor, etc., of N. Y., *respt.*,  
v. Samuel Buell, *applt.*

Decided June 30, 1884.

It does not follow, because by the act of 1882, the local laws of New York City are consolidated into one act, that a prior local law has been repealed, unless this is done expressly or by necessary implication.

The act of 1882, authorizing the Common Council to pass ordinances for licensing intelligence offices and to fix the license fees, has not been repealed by the Consolidation act of 1882; and any person keeping an intelligence office without procuring a license is subject to the penalty of \$50 prescribed by the city ordinances.

Appeal by defendant from judgment rendered by Justice George W. Parker, Third District Court.

Action under city ordinance for penalty of \$50, for keeping intelligence office without license.

Judgment was rendered against defendant, and upon appeal it was contended in his behalf that the act of 1882, giving control over intelligence offices, etc., to the Common Council, was repealed by the Consolidation Act of 1882; also, that judgment should be reversed on the ground that neither the legislature nor the Common Council have defined what an intelligence office is.

*William A. Boyd*, Corporation Attorney, for *respt.*

*Louis C. Wahner*, for *applt.*

*Held*, Untenable; that it does not follow, because by the act of 1882, the local laws of the city of New York have been consolidated into one act, that a prior local law has been repealed. It must be repealed expressly or by necessary implication.

All that has been done in the consolidation act in respect to the keepers of intelligence offices is that they are classified amongst those in relation to whom ordinances requiring them to be licensed may be passed by the Common Council.

The leaning of the courts is so strongly against repealing the positive provision of a former statute by construction as almost to establish the rule of no repeal by implication. *Dwarris Statutes*, 673, 674. It is only where the provisions of the subsequent act are so contrary

or incompatible with the former that it will amount to a repeal of it, or where the whole construction of the subsequent act shows that it was intended to supersede it. 13 How., U. S., 429; Potter on Statutes, 155 to 161.

*Further held*, That the term intelligence office has a well-known meaning, not only in this city and this State, but throughout the United States. It is sufficient to quote the definition of it by Webster, who says "an intelligence office is an office or place where information may be obtained, particularly respecting servants to be hired."

Judgment affirmed, with costs.

Opinion by *Daly, Ch. J.*; *Larrimore, J.*, concurs.

## STATUTES. REPEAL.

### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jennie Bingham, *applt.*, v. James R. Burlingame, *shff.*, *respt.*

Decided May, 1884.

The repeal of a statute terminates all proceedings under it which are not fully completed, unless there is a saving clause exempting them from the operation of the repeal.

Chap. 245, Laws of 1880, preserves any right lawfully accrued prior to the taking effect of the act, but the new remedy provided by the Code must be followed.

Appeal from County Court order, denying motion for new trial on the minutes.

Replevin for a piano. Defendant justified under an execution issued against the property of plaintiff's husband, upon a surro-

gate's decree. Defendant alleged that the piano was the husband's property, and was levied on as such. The decree was entered in July, 1879, and docketed in Nov., 1879. The execution was issued Nov. 15, 1880, and was tested in the name of a justice of this court, and subscribed with the name of the attorney of the owners of the judgment. Plaintiff contends that the execution was void, it not having been issued by the Surrogate or his clerk under the seal of his court, as required by § 2554, Code Civ. Proc. Respondent claims the case is controlled by Laws of 1837, Ch. 460, § 64, as amended by Laws of 1844, Ch. 104, § 2, the statute in force when the present Code took effect, and that as the execution complies therewith, except as to the teste, it is valid. Code C. P. § 24; 5 How. Pr., 381.

*J. A. Adlington*, for applt.

*J. Sullivan*, for respt.

*Held*, That plaintiff's contention is right. The Acts of 1837 and 1844 were repealed by Ch. 245, Laws of 1880, § 1, subs. 14 and 21, which took effect Sept. 1, 1880. The repeal of a statute arrests and terminates all proceedings under it which are not fully completed, unless there is a saving clause exempting them from the operation of the appeal. 1 Hill, 324, and cases cited; 17 Hun, 378. Under Chapter 245 any right lawfully accrued or established prior to the taking effect of the Act is preserved, but the new remedy provided by the Code must be followed. See 6 Wend., 529, 531; 8

N. Y., 497, 504; 81 id., 143, 149; 11 W. Dig., 483; 26 Hun., 179, 180.

Subd. 11 of § 3347, Code Civ. Proc. has no application to the case.

Distinguishing 4 Redf. Surr., 318; 1 Civ. Proc., 33; 1 Code Rep., 127; 22 Wend., 636.

The execution, not having been issued out of the Surrogates court as prescribed by § 2554 of the Code, was void, its reception in evidence was error, and it constitutes no defence.

Order reversed and new trial ordered in County Court. costs to abide event.

Opinion by *Smith, P. J.*; *Har- din* and *Barker, JJ.*, concur.

## CORPORATIONS. TRUSTEES.

N. Y. COMMON PLEAS. GENERAL TERM.

J. H. Westerfield et al., *respts.*, v. William Radde et al., *appls.*

Decided May 22, 1884.

An annual report of a corporation signed by two trustees, and verified by one of them as acting vice-president, when the certificate of incorporation was signed by seven and acknowledged by nine trustees, does not satisfy the provisions of § 12, Act Feb. 17, 1848, in the absence of the evidence of official records showing the resignation of the president and secretary and of sufficient trustees to make the number signing the report a majority of the board.

Appeal from judgment in favor of plaintiffs.

Action by creditors against trustees of corporation, under § 12, Act Feb. 17, 1848.

The annual report of Jan. 20,

1873, was made by only two of the trustees, one of whom verified the same as the late acting vice-president of the company. It appears from the minutes of the board of trustees, May 4, 1872, that the resignation of one Meyer as trustee was received and accepted. It was not shown by any official record that Bock, the president, or any other trustee, had resigned his office. The certificate of incorporation was signed by seven trustees (including the defendants), and acknowledged by nine trustees.

There was testimony by a witness for the defense, one Blockwenn, tending to prove such resignations as would show the certificate to have been signed by a majority of the board as it then existed.

*John. A. Foster*, for applts.

*John P. Reid, Jr.*, for respts.

*Held*, That the judgment should be sustained. There is no official record showing the resignation of either the president or secretary of the company. Nothing less than this should be allowed to defeat the provisions of a public statute intended to protect the interests of creditors who were without possible knowledge of the directorial acts of the company. The statute requires that the president or secretary shall verify the annual report, which must be signed by the president and a majority of the trustees. A refusal in either case could have been reviewed by the court and compliance with the requirements of the statute enforced.

The report filed did not satisfy the provisions of the statute. Two trustees do not constitute a majority of either seven or nine. The resignation, if made, should have been shown by an official record. The loose statements of the witness Bleckwenn should not be allowed to supersede the well recognized principle that the records of a corporation are *prima facie* evidence of its official acts as well as those of its individual members. Any other theory would be subversive of justice. Three or more individuals might organize a company, incur a liability, and then by simply saying "I will resign," or by refusing to take part in any other proceedings, rid themselves of a responsibility which they had voluntarily assumed. This could not have been the intention of the act in question—to leave creditors for whose benefit it was enacted to the mercy of the incorporators. They must be held to a knowledge of their liability imposed by the statute, and if overreached or injured by any act or omission of their associates must seek redress through the well known channels of the law. The resignation of the defendant Meyer was accepted before the present liability had been incurred, and he is therefore not chargeable with any neglect of duty.

Judgment affirmed.

Opinion by *Larremore, J.*; *J. F. Daly* and *Van Hoesen, JJ.*, concur.

## MUNICIPAL CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Board of Education of District School No. 2, of Onondaga, *respt.*, v. The Board of Education of District School No. 29, of Onondaga, *applt.*

Decided May, 1884.

If part of a municipal corporation be separated from it by the erection of a new corporation, the former corporation retains title to all its personal property where no different provision is made by the act authorizing the separation.

Appeal from judgment on referee's report.

In April, 1878, the defendant district was organized out of a part of the old district, the present plaintiff. At the annual meeting of the old district in October, 1877, the treasurer thereof had in his hands \$552.37 of said district's money. After district No. 29 was organized plaintiff began suit against the treasurer for such money. Defendant claimed a portion of it, and upon its petition an order was made substituting defendant in this action, and directing the treasurer to bring the money into court, which he did, and was thereupon discharged from liability to either party. The referee found that two-thirds of the assessed valuation of the property of District No. 2, as it originally existed, was located in and owned by residents of the territory set off to District No. 29. All the real estate and buildings of the old district were located within District No. 2, after the division.

*Waters, McLennan & Dillaye*, for applt.

*Pratt, Brown & Garfield*, for respt.

*Held*, That as the act contains no provision giving the new corporation any portion of the money, it remained the property of District No. 2. 4 Mass., 387; id., 534; 2 Wend., 109; Dill on Mun. Corp., §§128, 129.

The fund was, by order of court, placed in bank to the credit of this suit, at 4 per cent. interest. By the judgment as entered plaintiff recovers of defendant \$607.60 damages, besides \$205.03 costs; the judgment contains the further provision that the bank, on presentation of a certified copy of the judgment pay plaintiff the principal sum of \$552.37, with accrued interest, and that such sum, when so paid, be deemed as so much paid on the judgment.

*Held*, That as this fund has never been in defendant's hands and is deposited in bank by order of court, judgment against defendant was illegal, and the judgment should be modified, awarding the moneys to plaintiff, and striking out the recovery against defendant as to amount of the fund, without costs to either party on this appeal.

Opinion by *Barker, J.*; *Smith, P. J.*, and *Hardin, J.*, concur.

MARRIED WOMEN. TORTS.  
N. Y. SUPERIOR COURT. GENERAL TERM.

Frederick N. Muser et al.,

*respts.*, v. Joseph Lewis, impld.,  
applt.

Decided June 26, 1884.

The statutes of this State have not changed the common law liability of the husband for his wife's torts, except as regards those committed by her in the management and control of her separate property.

Where the wife carries on a legitimate business and receives in it stolen goods, the husband is liable with the wife, for she cannot carry on a business of receiving stolen goods nor acquire any property in such goods.

Appeal from judgment in favor of plaintiffs.

Action for conversion of plaintiffs' personal property. The defendants were, with others, the appellant's wife. The proof showed that she was guilty of the actual conversion, and her husband, the appellant, did not participate in it. The claim against him was grounded on the proposition that he was liable in damages for his wife's tort. The testimony showed that a clerk of the plaintiffs stole from them, through a long time, a great quantity of laces, and from time to time sold them in parcels to the appellant's wife. The verdict was not taken as to whether she knew that they had been stolen.

*David Leventritt*, for applt.  
*D. M. Porter*, for respts.

*Held*, That the appellant, the husband, was not liable if the tort done by his wife related to her sole and separate property. On the other hand, if the tort did not relate to the wife's property, the appellant is liable.

The title to the goods always remained in the plaintiffs, and

they never became the property of appellant's wife. Therefore, the tort did not relate to the wife's separate property. If it be supposed that the wife did gain a property of some kind by the transaction, the tort was a separate matter from that which had the appearance of conferring title and had no essential connection with it, and so the tort was personal to the wife as distinguished from one relating to her property.

As to § 2, Laws of 1860, Chap. 9, which provides that a married woman may carry on any trade or business and perform any labor or services on her sole and separate account, the generality of the clause as to services has been restrained so that it does not include services done by the wife for her husband and the family. 93 N. Y., 17.

The common or former law remains, excepting to the extent it is clearly annulled by a subsequent statute. 92 N. Y., 152. In like manner, it may be said, as to the power of a married woman to carry on any trade or business on her own account, that it was not intended to embrace a personal tort that had no real connection with trading or carrying on a business.

Several parts of the statute indicate that they did not contemplate a sole liability of the wife for a tort incidentally committed by her when she was carrying on a separate business. Laws 1860, Chap. 90, §§ 1, 2, 7, 8.

Gerald v. Quam, 10 Abb. N. C., 28, disapproved.

Judgment modified as to amount, and affirmed as modified.

Opinion by *Sedgwick, C. J.*; *Ingraham, J.*, concurred in result.

### CHATTEL MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Henry Nixon et al., exrs.,  
*respts.*, v. William Stanley, *applt.*

Decided May, 1884.

The refilling of a chattel mortgage with proper certificate, although more than a year since the mortgage was first filed, will revive the mortgage as against an execution issued and delivered to the sheriff after such refilling, upon a judgment rendered prior thereto.

Appeal from judgment of County Court, affirming a justice's judgment.

Action for the conversion of a steer. P. owned a steer and mortgaged it to plaintiffs November 17, 1878. The mortgage was duly filed November 18, 1878. On November 19, 1879, the mortgage was refiled, with a certificate thereon indorsed stating the mortgagee's interest. On December 8, 1879, an execution, upon a judgment rendered against the mortgagor prior to November 18, 1879, was issued to the sheriff, who thereunder levied upon and sold the steer to defendant, he being fully advised of the existence and refilling of plaintiffs' mortgage.

*Delbert A. Adams*, for *applt.*

*J. D. Decker*, for *respts.*

*Held*, That the refilling of the mortgage, with a proper certificate indorsed thereon, prior to the re-

ceipt of the execution by the sheriff, restored and revived the mortgage against defendant. 12 Barb., 530; 44 id., 263.

Judgment affirmed, with costs.

Opinion by *Barker, J.*; *Smith, P. J.*, and *Hardin, J.*, concur.

### TEMPORARY ADMINISTRATOR.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* the goods, chattels and credits of Lucy Bankard, deceased.

Decided May 29, 1884.

There is no arbitrary principle or provision of law preventing the appointment to the office of temporary administrator of the person named as executor in a will over which there is a contest.

The Surrogate has no power in the order appointing a temporary administrator to make an allowance to such administrator to compensate him for the expense incurred in the course of the application for his appointment.

Appeal from an order of the Surrogate appointing Stephen H. Brown temporary administrator of the estate of Lucy Bankard, deceased, and directing an allowance of \$50 to be paid to him out of the estate of the decedent.

The appointment of Brown was resisted for the reason, among others, that he was the person named as executor in the will of the decedent which the appellants were contesting, and it was claimed by the appellants that, under the authority of 3 Redf. 535, 2 Redf. 100 and 3 Monthly Law Bull., 80, his appointment was improper. It was also claimed by the appellants

that the Surrogate had no power to grant the allowance to Brown.

*James M. Lyddy*, for appls.

*Wm. L. Clark*, for resp'ts.

*Held*, That there is no arbitrary principle or provision of law preventing the appointment to the office of temporary administrator of the person named as executor in a will over which there is a contest, and that in the present instance that seemed to have been a proper appointment.

That the power of the Surrogate to grant allowances to temporary administrators is limited to the cases specified in § 2,672 of the Code of Civil Procedure. That the allowance in question was probably inadvertently intended to compensate the temporary administrator for the expenses incurred in the course of the application for his appointment, and that this has not been authorized by the Code.

Order affirmed as to the appointment of the temporary administrator and reversed as to the allowance.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

### ORDER OF ARREST.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Daniel Frank et al., resp'ts.*, v. *Rudolph Sprinze et al., appls.*

Decided May 29, 1884.

Information is, ordinarily, insufficient to sustain so grave a proceeding as an order of arrest, and, if it should be acted upon in any case, the information should appear to have been derived in an apparently authen-

tic and circumstantial manner from persons whose affidavits at the time are not attainable.

Appeal from order denying motion to vacate an order of arrest.

The order was made upon two affidavits charging, upon information, that defendants had disposed of their property with intent to defraud their creditors. One of the affidavits was based wholly upon information derived from the following letter :

"EL PASO, May 1st, '84.

"MESS. FRANK, HERMAN & Co. :

"Gents :—I understand that one of the Sprinze Brothers and Davidson, of the firm of Sprinze Bros. & Davidson, left this morning for Europe via New York, with about \$5,000 each.

"W. W. MILLS."

The information upon which the other was based was a similar letter which had been shown deponent, but which was not in deponent's possession.

*Adolph L. Sanger*, for appls.

*John Frankenheimer*, for respts.

*Held*, That the affidavits proceeded more upon the basis of suspicion than that of information in any form, and are entirely insufficient to sustain the charge that defendants had disposed of their property with intent to defraud their creditors. That information has ordinarily been regarded as insufficient to sustain so grave a proceeding. 65 N. Y., 581; 78 N. Y., 252.

That if it should be acted upon in any case, the information should appear to have been derived in an

apparently authentic and circumstantial manner, and from persons whose affidavits at the time are not obtainable. 28 Hun, 397.

Order reversed, and order of arrest vacated.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Adam Haberstich, *applt.*, v. Frederick L. Fischer, *respt.*

Decided May 29, 1884.

Where a case upon the day calendar of the Court has been adjourned several times at the request of the plaintiff, who had not objected to the case proceeding on either of the occasions of applying for an adjournment upon the ground that no notice of trial had been served by the defendant, and the case is finally set down peremptorily for a certain day, and on that day a jury is empanelled without the above objection on the part of plaintiff, and the Court directs the counsel for the plaintiff to proceed, and he refuses to do so, the Court has the power to dismiss the complaint, notwithstanding the fact that no notice of trial has been served by the defendant.

Appeal from an order setting aside a dismissal of the complaint at the Circuit, on the payment of the term fee, disbursements and costs of motion.

This case was first called for trial on Monday, April 7th, 1883, when it was announced to be ready by plaintiff's counsel, except that one of his witnesses was not then able to attend. For that reason the trial was postponed until the following Monday, when the cause was again called, and a person



representing plaintiff's counsel stated him to be unwell. It was then put over to the next day with a peremptory direction that it must then be tried. On that day this excuse was repeated, and the case went over to the following day with the announcement that in case the counsel's disability continued other counsel must be engaged. On the next day plaintiff's counsel was in attendance and applied for a further postponement on the ground of his sickness. This application was denied and a jury empanelled and plaintiff's counsel directed to proceed, which he refused to do, and thereupon the Court dismissed the complaint. Subsequently plaintiff's counsel moved to set aside this dismissal upon the ground that no notice of trial had been served by defendant.

*H. H. Morange*, for applt.

*W. H. & D. M. Van Cott*, for resp't.

*Held*, That the proceeding was entirely regular. That the cause had been specially set down for the day on which it was moved, and no objection was taken to the right of defendant to move it, and acting upon this apparent acquiescence in his right the jury was drawn. That the cause was then regularly before the Court, and as long as plaintiff's counsel after that simply refused to proceed with the trial, the Court was clearly justified in directing a dismissal of the complaint. That as soon as the jury had been empanelled and were in readiness to proceed with the trial the power of the Court

over the action was as complete as if defendant had served a notice of trial.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

#### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edward G. Byrnes, *resp't.*, v. Edward J. Robinson, *applt.*

Decided May 29, 1884.

An order directing the sale of live animals attached may be made before an inventory of the attached property has been made and filed, and such order may be made upon the application of the plaintiff upon notice to the defendant. The sheriff is not a necessary party to the proceeding.

Appeal from an order directing the sale of a horse which had been seized upon a warrant of attachment.

Defendant appealed from the order upon the ground that it could not be made before an inventory had been made and filed as required by § 654, Code of Civ. Pro., and that the application should have been made by the sheriff and not by plaintiff.

*Arthur Furber*, for applt.

*Gratz Nathan*, for resp't.

*Held*, That it was not necessary that an inventory of the property attached should be made before an order could regularly be made directing the sale of the property. Code of Civ. Pro., § 656. That notice of the application for the order to sell the horse was given to the attorney for the defendant,

and the application itself was made by plaintiff's attorney, and that fully complied with all the directions of the Code. The sheriff was not a necessary party, but was simply required to obey the order which might be made by the court upon consideration of the facts.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

### N. Y. CITY. CONTRACTS.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Abraham Dowdney, *respt.*, v. Hubert O. Thompson, Com'r, *applt.*

Decided May 29, 1884.

The provisions of Chap. 147, Laws of 1882, requiring that when proposals for municipal work in the city of New York are invited the department or officer inviting the same shall require, as a condition precedent to the reception or consideration of any proposal, the deposit with such officer or department of a certified check upon one of the national banks of the city of New York, drawn to the order of the comptroller, or money to a certain amount, are not complied with by the deposit of such check or money with the proposal in a sealed envelope in a box kept in the office of the officer or department.

Appeal from order directing that a peremptory writ of mandamus issue.

In June, 1881, the Commissioner of Public Works of the city of New York advertised for proposals for constructing certain sewers, and in answer to such advertisement several contractors, among whom was the plaintiff, deposited their proposals enclosed in sealed

envelopes in a box kept for that purpose in the Commissioner's office. After these bids were opened the Commissioner rejected them all and advertised anew. The relator claimed that he was entitled to the contract as the lowest bidder, and applied for a peremptory mandamus to compel the commissioner to award it to him. It was claimed on behalf of the commissioner that he was entitled to reject all the bids because the provisions of Chap. 147, Laws of 1881, requiring that the officer or department inviting such bids should require, as a condition precedent to the reception or consideration of any proposal, the deposit with such officer or department of a certified check upon one of the national banks of the city of New York, drawn to the order of the comptroller, etc., had not been complied with. Plaintiff claimed that said law had been complied with by him, for such a check had been contained in the envelope enclosing his proposal and deposited in the estimate box.

*George P. Andrews*, for *applt.*

*Morgan J. O'Brien*, for *respt.*

*Held*, That it was not the intention of the legislature to permit a deposit to be made in a desk, drawer or box in the office. Such an interpretation would endanger the rights of the depositors as well as those of the city. That the true meaning intended is that the deposit should be made with the commissioner or other officer of the department as a condition precedent to the reception of the pro-

posai, and on such deposit being made the proposal may be received and deposited in the estimate box in which the ordinance of the city requires them to be placed.

Order reversed and mandamus denied.

Opinion by *Haight, J.*; *Davis, P.J.*, and *Daniels, J.*, concur.

### PRACTICE. STAY.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

William Matthews, *applt.*, v. George H. Shaffer et al., *respts.*

Decided May, 1884,

One W. conveyed by deed of full covenants and warranty certain realty to defendants, who executed to her a purchase money mortgage. Said W. assigned the bond and mortgage to plaintiff's testator, who commenced an action of foreclosure. Prior to such action, an action of ejectment had been commenced by one C. against defendants to recover possession of said premises on the ground that said W. was not seized in fee of the same when her conveyance to defendants was made. The action in ejectment was awaiting decision in the Court of Appeals. *Held*, That a stay in the foreclosure proceeding pending the ejectment suit was properly granted.

Appeal from order staying plaintiff's proceedings until the determination of a certain action in the Court of Appeals.

Action to foreclose a mortgage. The premises were purchased by defendant and another from one Wall and were entered upon by them under a deed of full covenants and warranty from said Wall. The bond and mortgage were given to secure a part of the consideration or purchase money of said premises. This bond and

mortgage was assigned to plaintiff's testator.

Prior to the commencement of this action, one of ejectment had been commenced by one Crooke against these defendants to recover possession of these premises, which action is now pending and awaiting decision in the Court of Appeals. Defendants admitted the allegations in the complaint and set up the defect of title of said assignor Wall.

*Lewis Hurst*, for applt.

*David Barnett*, for respts.

*Held*, That while the general rule is that a stay for an indefinite time to await the result in appellate court of an appeal in another action will not be granted, 1 Hun, 492, yet this case falls rather under the principle of 2 Johns. Ch., 546, followed in 26 Wend., 109. If the plaintiffs in the ejectment suit prevail, that fact furnishes a perfect defense to the present suit, as it not only proves an entire want of consideration for the bond but establishes a breach of the covenants in the deed for which the bond and mortgage was given.

Order affirmed, with costs and disbursements.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

### LANDLORD AND TENANT. DAMAGES.

N. Y. COMMON PLEAS. GENERAL TERM.

Julia H. Chadwick, *respt.*, v. Corydon A. Woodward, *applt.*

Decided May 22, 1884.

The rule is that where the landlord violates his covenant to repair the tenant may make the repairs and charge the landlord with the cost, or he may recover for the loss of the use of that part of the premises which the failure to repair has prevented him from enjoying. In order to recover consequential damages it must appear that they were foreseen at the time of the contract, and damages are remote when they do not immediately and necessarily flow from the breach complained of.

The above doctrines applied to a case of damages to health and business from defective plumbing and sewerage, and *Held*, That no recovery could be had by the tenant.

Appeal from an order of the General Term of the City Court, affirming a judgment upon a trial had before Mr. Justice McAdam and a jury.

Action by landlord for rent. Defendant, the tenant, interposed a counterclaim for damages for a breach of plaintiff's covenant to repair. The damages alleged are that the defendant and his family were made ill by bad sewerage, and that the defendant suffered by loss of business, as a dentist, in expense, and by ill health, to the amount of two thousand dollars. Upon the trial defendant offered to prove these damages. The sole question is, whether the damages alleged are not too remote. No charge of fraud is in the pleadings.

*Whitehead & Stuart*, for applt.  
*Foster & Thompson*, for resp't.

*Held*, That the damages both as to business and health were too remote. *Mayne Dam.*, 26; 35 N. Y., 273; 1 Ind., 329; T. Heiskell, 167; 2 Hilt., 234. Only those damages that are the primary and im-

mediate result of a breach of contract are to be considered, and the damages for which a contracting party is liable should be in proportion to the benefit he would receive if the contract were performed. In order to make the party committing a breach of contract liable for consequential damages it must appear that they were foreseen at the time of the contract. It cannot reasonably be said that either the landlord or the tenant, when they entered into this lease, expected that the neglect to put the plumbing in good order would result in injury to the tenant's business. It does not even appear that the landlord knew what that business was. Nor can it be supposed that either party looked forward to the tenant's sickness, or to the death of the tenant's servant, as something likely to follow an omission to put the plumbing in perfect order. The actual outlays made by the tenant for repairs were allowed to him.

Judgment and order affirmed, with costs.

Opinion by *Van Hoesen, J.*;  
*Larremore* and *J. F. Daly, JJ.*,  
concur.

#### SURROGATES COURT. PRACTICE.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

*In re* will of D. M. Chauncey,  
decd.

Decided May, 1884.

A justice of the Supreme Court, while sitting  
as surrogate, is entitled to the benefit af-

for the surrogate by § 2545, Code of Civ. Proc.

§ 2490, Code of Civ. Proc., does not prevent such justice from exercising the power that the surrogate could exercise in such a case. Rule 82 of the Supreme Court, as to the time of submitting requests to find, may be waived by the consent of parties and the approval of the judge who tries the case.

Appeal from part of an order of Special Term, denying a motion to strike out certain requests to find.

On a day before a final decision of the case the parties met before the justice, acting as surrogate, when the respondent stated that he desired to submit requests to find and requested time in which to do so. The justice then stated in the presence of appellant that requests might be handed in and he would pass upon them as of the date of signing the decree, and with that understanding the decree was signed.

*George J. Agar and J. Noble Haynes*, for applt.

*Wm. S. Cogswell*, for respnt.

*Held*, That the Legislature seems to have considered that in disposing of such controversies as are adjudicated in the Surrogate's Court the magistrate should be allowed in the preparation of his findings the benefit of such deliberation as may occur between the time of his decision and the final settlement of the case upon appeal. There is no reason why a judge of the Supreme Court, in deciding similar controversies, should be denied the same power. Code Civ. Proc., § 2486.

That § 2490, Code Civ. Proc., does not prevent the judge from exercising the power which a sur-

rogate could exercise in such case, for the reason that the submission of findings is not necessarily a part of the trial. The trial ends when a case is submitted for determination. 35 How., 410. But under § 1023 the proposed findings may be submitted within such time as the Court may allow. Hence their submission is not a part of the trial and is not covered by § 2494.

That Rule 32, as to the time of submitting requests to find, can undoubtedly be waived by consent of parties and the approval of the judge who tries the case. That in this particular case the appellant is estopped from asserting that the requests were not submitted prior to the decision. Had the understanding been otherwise than as indicated on the day in question an adjournment would have been had to allow the contestants to comply with the rule.

Order affirmed, with costs and disbursements.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

## EVICTIION. DAMAGES.

N. Y. COMMON PLEAS. GENERAL TERM.

*Maurice Fitzgibbons et al., applt.s., v. Martin Freisen, respnt.*

Decided May 22, 1884.

Plaintiffs, being the lessees of a portion of certain premises, were evicted by title paramount, and thereupon leased the whole premises anew at an increased rent and for a longer term, and subsequently sold said lease at a large profit.

*Held*, Error to receive evidence of such fact in an action by plaintiffs to recover damages for breach of covenant for quiet enjoyment, the measure of damages in case of eviction being the difference between the rent received and the fair rental value of the premises.

Appeal by plaintiffs from judgment.

Action to recover damages for the breach of a covenant of quiet enjoyment of part of the premises Nos. 65 and 67 Crosby street, on the ground of a constructive eviction of the lessees under paramount title. The lessees to protect their interests took a new lease of the whole premises at an increased rent and longer term, which they subsequently sold at a profit of \$10,000. Testimony was admitted of this fact, and the court left it to the consideration of the jury under exception, and the jury found a verdict for defendant.

*De Witt C. Brown*, for applts.

*D. M. Wager*, for respt.

*Held*, Error. The measure of plaintiffs' damages—if they were evicted—is the difference between the rent reserved and the fair rental value of the premises. 42 N. Y., 167. The new lease was an independent transaction by which the respondent incurred no liability, and from which he should not now be allowed to claim a benefit. The nature and extent of the new obligation is not shown. The profit of \$10,000 may have been the result of extra outlay and expenditure by the appellants. If the transaction had resulted in a loss it would not have been chargeable

to the respondent. It is impossible to say how much the jury were influenced by the fact that the lessees were ultimately indemnified for their loss. It is enough to know that their claim upon the breach of covenant was submitted for adjudication, with a qualification that was clearly unauthorized.

Judgment reversed and new trial ordered, with costs to abide the event.

Opinion by *Larremore, J.*; *C. P. Daly, Ch. J.*, and *Beach, J.*, concur.

#### MECHANIC'S LIEN.

N. Y. COMMON PLEAS. GENERAL TERM.

Walter Powers, *applt.*, v. Isabella V. Hogan, *respt.*

Decided May 22, 1884.

In an action to foreclose a mechanics lien, where there has been an abandonment of the contract by defendant, it is not necessary for plaintiff, in order to recover upon *quantum meruit*, to show legal excuse for not fully performing the contract, nor where the time fixed by the contract for its performance has been waived to notify defendant of his intention, and demand performance on his part within a reasonable time.

*Lawson v. Hogan*, 93 N. Y., 39, distinguished.

Appeal from judgment entered upon report of referee in favor of defendant.

Action to foreclose a mechanic's lien in favor of the plaintiff upon certain premises in the City of New York owned by the defend-

ant. The referee found for the plaintiff upon the facts alleged in the complaint, but decided that as it appeared that the contract in suit had not been fully performed by the plaintiff, and he had not shown a sufficient legal excuse for abandoning it, no recovery could be had upon a quantum meruit; that as the time fixed by the contract for its performance had been waived the plaintiff was bound to notify the defendant of his intention and demand performance upon his part within reasonable time.

The referee also found that the plaintiff failed to perform on account of the refusal of the defendant to allow him to continue his work; that he continued in its performance according to directions until he was stopped and forbidden to further complete the same by one Hogan, who acted therein by the authority of the defendant.

*F. B. Chedsey*, for applt.

*M. J. Early*, for respt.

*Held*, That as there was an abandonment of the contract by the defendant, the rule in *Lawson v. Hogan*, 93 N. Y., 39, is not applicable, and neither notice nor demand was necessary upon such a refusal of performance.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Larremore, J.*; *Van Hoesen* and *Beach, JJ.*, concur.

## DISCRETIONARY ORDER. COMMON PLEAS.

N. Y. COMMON PLEAS. GENERAL TERM.

James Walsh, *applt.*, v. Charles Schulz, *respt.*

Decided May 22, 1884.

The Court of Common Pleas will not review a discretionary order of the City Court, and there is nothing in § 3191, Code Civ. Proc., or the amendments thereof, which makes it incumbent upon the court to entertain such appeals.

The Court of Common Pleas holds the same position with respect to the City Court that the Court of Appeals holds with respect to the Supreme Court and the Superior City Courts.

Appeal from an order of the City Court, General Term, affirming an order opening a judgment entered by default.

It was contended in behalf of respondent that the order being discretionary it should not be reviewed by the General Term of the Common Pleas.

The appellant urged that the appeal was authorized by § 3191 Code Civ. Proc.

*E. H. Benn*, for applt.

*Charles Wehle*, for respt.

*Held*, That though the language of section 3191 differs in some particulars from that of section 190, the differences do not affect the matters under consideration. With respect to the Marine Court the Court of Common Pleas occupies the same position that the Court of Appeals holds with respect to the Supreme Court and the Superior City Courts. The rules that govern the Court of Appeals in

passing upon appeals from the Supreme and the Superior City Courts are applicable to the Court of Common Pleas. 8 Daly, 167; 74 N. Y., 307.

The Court of Appeals will not review the discretion of a court of original jurisdiction. 73 N. Y., 187; 53 N. Y., 331; 70 N. Y., 571.

Appeal dismissed, with costs.

Opinion by *Van Hoesen, J.*; *Van Brunt, J.*, concurs.

#### REFEREE FEES. FORECLOSURE.

#### N. Y. COMMON PLEAS. GENERAL TERM.

Thomas E. Brady v. William L. Kingsland. Same v. Caroline L. Macy.

Decided May 22, 1884.

A referee to sell in foreclosure can recover for his services, as such, no more than the fees prescribed by the statute of 1869 (and 1874), though an express agreement to pay a larger sum was made.

Whether said act is constitutional, *quære*.

Plaintiff, as assignee, sued for services as referee to sell in foreclosure under an express agreement. The defense (among others) was payment in full. Several adjournments were had, and then the property was sold at private sale.

The disbursements of the referee for publishing the notices of the sale were \$81. These were allowed, and the justice also awarded the plaintiff the maximum sum allowed by the law for the full performance of all the duties that are devolved upon a referee who con-

ducts a sale in foreclosure, to wit, \$50. The account then stood thus:

Disbursements.....	\$81.00
Fees.....	50.00
	<u>\$131.00</u>
By cash.....	CR.
Balance.....	<u>\$100.00</u>
	\$81.00

For the sum of \$31 the justice gave judgment.

*William Whaley*, for appls.

*Stephen L. Brague*, for resp't.

*Held*, Error. The referee was entitled to nothing more than the fees that are prescribed by the act of 1869. 80 N. Y., 317; 61 How. Pr., 103; *id.*, 522; 4 L. Bull., 6.

His disbursements were.....	\$81.00
For receiving order, posting notice of sale.....	10.00
Not more than three adjournments...	9.00
Total.....	<u>\$100.00</u>

It appears, therefore, that the referee has been paid in full. The referee could not make a valid contract for the payment of more than the statutory fees. The law condemns and will not lend itself to the enforcement of such contracts. We do not feel called on to review the decisions that have been made respecting the binding force of the act of 1869. I have carefully read the argument of the counsel for the plaintiff, but I am not at all convinced that the act is unconstitutional.

The judgment should be reversed.

Opinion by *Van Hoesen, J.*

*J. F. Daly, J.*—I have some doubts as to the constitutionality of the acts of 1869 and 1874, that question being now directly raised,



but I am constrained to follow our General Term in *Lockwood v. Fox*, 61 How., 522. *Larremore, J.*, concurred for reversal.

### FORFEITURE. SECURITY.

N. Y. SUPERIOR COURT. GENERAL TERM.

John G. Scott, *plff.*, v. Pedro Montello, *deft.*

Decided June 26, 1884.

Where the tenant deposited a sum of money "as security for the payment of rent according to the provisions and conditions of the lease, and security to be paid back to the tenant on the full compliance with the provisions of the lease on the part of the tenant," and the tenant was dispossessed during the term for the non-payment of rent, the amount being smaller than the deposit aforesaid, and no other covenant was broken. *Held*, That such deposit was not forfeited, but that the landlord could only withhold thereof the amount of the rent due.

Exceptions ordered to be heard at General Term.

The plaintiff's assignor, one Dosot, leased from the defendant certain premises and deposited with him the sum of nine hundred dollars "in lieu of security." The lease contained a provision that the defendant should pay interest on this sum, and hold it as his security for the payment of rent according to the conditions and provisions of the lease, and that said security was to be paid back on the full compliance with the provisions of the lease on the part of said Dosot. Said Dosot was dispossessed for non-payment of rent. The plaintiff, as assignee of said

Dosot, brings this action to recover said sum of nine hundred dollars.

The evidence showed that all the covenants of the lease, except the covenant to pay rent, were fully performed, and that the covenant to pay rent was broken by the non-payment of the sum of \$138.36.

The trial judge directed a verdict for defendant, on the ground that as the whole amount of rent due had not been paid, there was not a full compliance with the terms of the lease.

*A. J. Walker* and *D. L. Waller*, for *plff.*

*Kent & Auerbach*, for *deft.*

*Held*, Error. That the money was deposited for two purposes: 1st. It was deposited in the place of security for the payment of such rent as should be due at the termination of the lease, which was in this case \$138.36; and 2d, it was deposited as security for the performance of the other covenants on the part of plaintiff's assignor, and as none of these covenants were broken the deposit could only be held for the payment of the rent due at the termination of the lease.

On the evidence plaintiff was entitled to recover from defendant the difference between the amount of rent due (\$138.36) and nine hundred dollars.

Exceptions sustained and new trial ordered, costs to abide the event.

Opinion by *Truax, J.*; *Sedgwick, C.J.*, concurs.

## CORPORATIONS. TRUSTEES.

## N. Y. COMMON PLEAS. GENERAL TERM.

George J. Bolz et al., *appls.*,  
v. Herman Ridder, *respt.*

Decided March 14, 1884.

The statutory certificate by the trustees of a corporation stated that the whole of the capital stock of the corporation had been paid up in full by the purchase of a certain described patent. In an action by a creditor of the corporation to enforce the statutory liability of the trustees for its debts, upon an allegation of the falsity of said certificate, &c. *Held*, That though said certificate in form followed the statute, the question of the value of the patent, and whether it was worth the amount of the stock, is material, and is a question for the jury.

Appeal from judgment dismissing the complaint at the close of plaintiffs' case.

The action was brought by a creditor of a corporation to enforce the statutory liability of a trustee, resulting from alleged false statement in the certificate as to full payment of capital stock.

The "Self-Folding Tucker Company" was incorporated under the general manufacturing act and the acts amendatory thereof. The defendant was a trustee of said company, and in connection with its president and other trustees executed a certificate, pursuant to section 11 of said act, stating "that the capital stock of said company is \$100,000; that the whole of said capital stock has been issued and paid up in full by the purchase of a patent sewing machine attachment, property necessary for the company's business, in payment

for which the whole capital stock was issued; that the payment of said capital stock was made December 26, 1879." The patent referred to was originally issued to Charles F. Knoch, who transferred one-half of his interest therein to the defendant when the Knoch & Ridder Co. was founded and continued in business about six months. This company, in consideration of one dollar, assigned the patent to E. B. Amend, December 4, 1879, who, on December 10, 1879, assigned it to the Self-Folding Tucker Company for the expressed consideration of \$100,000, which represented a like amount of the stock of said company simultaneously transferred to Amend.

The capital stock of the Knoch & Ridder Co. was \$1,000; Knoch sold his half interest in the patent for \$500; and he was to buy one-half of the stock and become half owner in the Knoch & Ridder Co., and the defendant, the other member of the company, paid \$500 for his half of the stock.

Evidence to show the value of this patent was excluded.

*A. Loring Cushing*, for applt.

*Jacob A. Gross*, for respt.

*Held*, That the certificate is in the precise form of section 2, chapter 333 of the Laws of 1853, which requires that stock issued in payment for property necessary for the business of the company shall not be stated as issued for cash paid in, but shall be reported in this respect according to the fact. This was done if the certificate be

true; and the only question left for consideration is whether or not the difference between the value of the patent and the stock issue for its purchase was so grossly inadequate as to raise the presumption of guilty knowledge and fraudulent intent on the part of the defendant.

The astonishing leap in the value of the patent—which constituted the entire property of the company—from \$1,000 to \$100,000 should have been explained. Whether the form the transaction took was a mere sham intended as an evasion of the statute was a question of fact for the determination of the jury. It may be said that the statute may be thus easily circumvented and evaded; but the policy of the law will be preserved and enforced if all the questions of fact in such cases be left to the jury. 90 N. Y., 94.

Judgment reversed; new trial ordered, costs to abide event.

Opinion by *Larremore, J.*; *J. F. Daly, J.*, concurs.

#### UNDERTAKING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John Hurd, *applt.*, v. The Hannibal & St. Joseph RR. Co., *respt.*

Decided May 29, 1884.

Under Chap. 486, Laws of 1881, an undertaking upon appeal executed by the appellant, the performance of the covenants and conditions of which are guaranteed by

the Fidelity and Casualty Co. of N. Y., may be accepted and approved by the court.

The title of the said act, viz., "An act to facilitate the giving of bonds required by law," is broad enough to include undertakings; and, by providing for the giving of undertakings, it does not violate § 16 of Art. III. of the Cons. prohibiting the passage of any local or private act embracing more than one subject, which must be expressed in its title. Moreover, the said act is not a private or local act, and, consequently, does not fall within said Constitutional provision.

The said act has so far modified the provisions of the Code of Civil Procedure requiring two sureties on an undertaking on appeal to the Court of Appeals as to dispense with them when a guaranty of the kind therein specified is given.

When such a guaranty is given the respondent has a right to examine the officer of the company as to its ability to enter into and make the guaranty.

Appeal from an order allowing and accepting an undertaking on appeal to the Court of Appeals, executed by the defendant, the performance of the covenants and conditions of which was guaranteed by the Fidelity and Casualty Co. of N. Y.; and denying the respondent an opportunity to examine the officers of said company as to its ability to make such guaranty.

The undertaking was objected to by the respondents upon the grounds that it was not executed by two sureties as required by § 1334 of the Code of Civil Procedure; that the Fidelity and Casualty Company had no power to make the guaranty, and that Chap. 486 of the Laws of 1881, under the authority of which the undertaking was accepted, entitled "an act to facilitate the giving of bonds required by law," violated § 16 of

Art. III. of the Constitution, prohibiting the passage of any local or private act embracing more than one subject, which must be expressed in the title, inasmuch as it provided for the giving of undertakings as well as bonds.

*L. B. Bunnell*, for applt.

*Thos. S. Moore*, for resp't.

*Held*, That since the Fidelity and Casualty Co. of N. Y. was incorporated under the general laws of the State, and was authorized to transact business by way of guaranteeing the fidelity of persons holding positions of public or private trust, it had authority, under Chap. 486 of the Laws of 1881, to guarantee bonds or undertakings required by law.

That as bonds and undertakings are, to a very great extent, understood to be controvertible terms, the title of the act was not materially deficient. But that, if it had been, it would be of no importance, for the reason that the act is neither a private nor a local law.

That the said act has necessarily so far modified the provisions of the Code of Civ. Pro. requiring two sureties in such an undertaking as to dispense with them when a guaranty of this description may be given. That it was clearly its object to substitute the guaranty in place of the liability and obligation of the sureties otherwise required by law.

That it was error for the court to refuse to permit the plaintiff to examine the officers of the company as to its liability to enter

into and make the guaranty. That when the specific objections were overruled further proceedings should have been taken on the part of the respondent to examine the officers of the company, if he so desired, and thereupon the court should have approved or disapproved of the undertaking.

Order modified accordingly.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurred.

### ASSESSMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* petition of Solomon Mehrbach to vacate an assessment.

Decided May 29, 1884.

An application, under chap. 333 of the laws of 1858, to vacate or reduce, etc., an assessment can be made only by the person owning the property assessed, or by those jointly interested in it, and a joint proceeding by persons owning several distinct interests or titles is not authorized by that act.

If such a joint proceeding is commenced, and an order is afterward made granting leave to the parties to sever their petition and to serve separate ones, its effect is to discontinue the joint proceeding, and the service of an individual petition commences a new proceeding, to which the payment of the assessment, after the commencement of the joint proceeding but before that of the individual one, constitutes a defence.

Appeal from an order directing the reduction of an assessment.

In December, 1873, the petitioner, with others owning other parcels of lands, joined in a petition under Chap. 338, Laws of 1858, to vacate an assessment im-

posed upon their lands. The proceeding remained in this condition until August, 1883, when an order was made granting leave to the petitioners to sever their petition, and serve separate ones; and after the making of this order the petitioner served such an individual petition. In the meantime, however, and in the year 1877, the assessment had been paid, and such payment was relied upon as an answer to the application.

*Albert L. Cole*, for applt.

*P. A. Hargous*, for respt.

*Held*, That, under chap. 338 of the laws of 1858, an application to vacate an assessment could be made only by the person himself owning the property or by those jointly interested in it, and a joint proceeding including several distinct interests or titles was not provided for by that act. See 43 Barb., 239, 260; 10 Abb., N. S., 119.)

That the effect of the order granting leave to serve separate petitions was to discontinue the preceding proceeding, and the service of an individual petition by the petitioner was the commencement of an entirely new proceeding, to which the payment of the assessment prior to its commencement formed a legal answer. Chap 338, Laws of 1858; 77 N.Y., 170; 93 N. Y., 512.

Order reversed and motion denied.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

## PAROL EVIDENCE. CONTRACT.

N. Y. COMMON PLEAS. GENERAL TERM.

Michael O'Meara, *respt.*, v. Hamline Q. French, *applt.*

Decided May 22, 1884.

When the only written evidence of the contract between the parties is a letter offering to do the work therein specified and described for a certain price, and an acceptance endorsed thereon, no time of payment being specified, in an action to recover the price agreed on, defendant may introduce parol evidence to show that it was part of the contract that he should have three months credit, especially when the contract upon its face shows that it does not embody the whole agreement.

Appeal by defendant from judgment in favor of plaintiff.

The complaint alleged a proposal by the plaintiff, as follows:

NEW YORK, July 21, 1883.

MR. H. Q. FRENCH:

*Dear Sir*.—I propose to do the following work and alterations in your building, No. 237 Fifth avenue, New York City:

To make alterations on third and fourth stories, as per plan and specification; also the wood work of water closet in first story; to repair and remove skylight on roof over stairs and to fill the old well hole with timbers and plank to be tinned over and painted. The old casing on front and rear windows of third and fourth stories to be taken off and to be replaced with new ones to correspond with the new trim there at present. Also, to repair all the plastering in second, third, fourth and

fifth stories. Painting of the alterations to be made to correspond with mahogany stain there at present.

I agree to do the above work for the sum of eight hundred and sixty (\$860) dollars.

Yours respectfully,

M. O'MEARA,  
Builder, 221 East Eleventh Street.

Accepted :

H. Q. FRENCH.

The defence was that the work done was upon a credit of three months, which had not expired when the action was commenced, but the court below refused to receive oral evidence of that fact.

*L. B. Bunnell*, for applt.

*S. Kohn*, for respt.

*Held*, Error. That in this case such evidence should have been received.

An inspection of the case presented for review shows that one Mahoney conducted the negotiations between the parties; that the work was nearly done when French accepted the written proposal. He acted by his agent and evidently relied upon the three months credit. The letter shows upon its face that it is not a complete contract. Strictly construed payment of the \$860 might have been claimed when it was accepted, without reference to the performance of its conditions. Did French intend or O'Meara expect that the contract sum should be paid if the work was not done? Yet upon this point the within instrument is significantly silent. The evidence in the case repels

such a conclusion and plainly indicates that the rule in *Juillard v. Chaffee*, 92 N. Y., 533, should be applied. The credit claimed related to the consideration of the contract, which might have been impeached by parol evidence. 78 N. Y., 74.

Judgment reversed, new trial ordered, costs to abide event.

Opinion by *Larremore, J.*; *J.F. Daly, J.* concurs; *Van Hoesen, J.*, concurs, citing *Wharton Ev.*, § 1027; 64 N. C., 96.

#### COSTS ON ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William H. Parsons et al.,  
*respts.*, v. Dan'l J. Sprague, *applt.*

Decided May 29, 1884.

When in an action in which an attachment has been issued a percentage upon the value of the property attached has been granted as an additional allowance of costs and has been included in the judgment, and the attachment has been subsequently vacated, the defendant is entitled to have the amount of such percentage stricken from the costs adjusted and from the judgment, notwithstanding the fact that, previous to the motion to strike out said sum, the judgment had been affirmed on appeal to the General Term when the right to these costs was in no manner drawn in question by the appeal.

Appeal from an order denying an application to strike out from the costs adjusted, and included in the judgment, the sum of \$62.36, being the percentage allowed to the plaintiff under § 3252 of the Code for the issuing and service of an attachment in the action.

The motion to strike out this sum was made for the reason that the attachment had been vacated. The motion was denied chiefly for the reason that an appeal had been taken from the judgment and it had been affirmed by the General Term.

*W. B. Larned*, for applt.

*Gilbert R. Hawes*, for respts.

*Held*, That after the attachment itself, on the basis of which this allowance was made, was set aside, that necessarily deprived the plaintiffs of their legal rights to these allowances.

That as the right to these costs was in no manner drawn in question by the appeal or considered or determined by the court, the disposition of the appeal by the affirmance of the judgment did not establish the right of plaintiff to recover this sum of money.

Order reversed, and order entered deducting from the costs in the action this sum of \$62.36.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

### TRESPASS. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Edward F. Adams, *applt.*, v. Hiram N. Robeson, *impld.*, *respt.*

Decided April, 1884.

In an action of trespass the answer alleged that the property taken was owned by a third person and that all the alleged trespass was made under the direction and as the agents of said person. *Held*, Sufficient to authorize proof of such ownership and agency.

Appeal from judgment of county court, reversing justice's judgment in favor of plaintiff.

The complaint alleged that defendant and one W. unlawfully took from the possession of plaintiff and carried away one dapple grey mare, the property of plaintiff, of the value of \$65, and still detains the same.

Answer, denial and "that at the time of the alleged taking of the dapple grey mare the said mare was owned by one T. and said T. was entitled to the immediate possession and control of said mare; that all of said alleged trespass stated in said complaint was made under the direction of said T. and in such alleged taking of said mare said defendant acted as the duly authorized agent of said T., the said owner of said mare."

Plaintiff proved possession, value of the mare and that W. took it and delivered it to T., and then rested.

Defendant then called T. and put the question, "Who does this horse belong to?" which was objected to as immaterial and incompetent and that it could not be shown that the title to the horse was in a stranger. The objection was sustained. He was then asked, "Did you authorize these defendants to act for you in taking the horse?" which was excluded on objection that it was leading.

*J. H. Waring*, for applt.

*Spring & Van Aernam*, for respt.

*Held*, That the justice erred in rejecting this testimony. Under a general denial defendant may not

justify taking and carrying away property by showing title in a third party. 11 Johns., 132. Nor can defendant justify in an action of trespass *de bonis asportatis* by showing title in a third party without alleging such title and connecting himself with the title. 56 Barb., 652; 62 N. Y., 222. But here defendants alleged title in T. and that all that they had done in respect to the property they had done as the agents of T. Pleadings are liberally construed in a justice's court and the answer was definite and sufficient enough to let in the proof tendered.

Judgment of County Court affirmed.

Opinion by *Hardin., J.; Smith, P. J., and Barker, J.,* concur.

### BOND. JURISDICTION.

#### N. Y. COMMON PLEAS. GENERAL TERM.

Meyer Sonneborn, *applt.*, v. William Libby et al., *respts.*

Decided June 30, 1884.

Defendants in 1873 instituted proceedings against plaintiff, in the United States District Court in Alabama, to have him declared bankrupt, and after the issuance of a provisional warrant of bankruptcy against plaintiff's estate defendants were required to give a bond to indemnify him from damages and from said warrant in case proceedings should be dismissed. In an action on the bond, *Held*, That the order for it being by a statutory court, and not expressly authorized, it was not within the line of judicial discretion, and therefore was void.

Appeal from judgment.

The plaintiff was engaged in business as a merchant in the

State of Alabama, and defendants filed a petition in bankruptcy in the United States District Court of that State against him, praying that he be adjudicated a bankrupt; a provisional warrant in bankruptcy against the estate of the plaintiff was thereafter issued under which his property was attached. Subsequently, an order of said Court was made requiring the defendants to file the bond in dispute, in the sum of \$5,000, to indemnify the plaintiff for any damages which he might sustain on account of said provisional warrant, if he should be proved not to be a bankrupt and the proceedings against him by the petitioning creditors should be dismissed. This action was upon said bond.

After the plaintiff rested, defendants moved to dismiss the complaint on the following grounds, among others, that the bond in question was void, as the court had no authority to order it, and that there was no consideration to support it. The complaint was dismissed, and from the judgment thus entered the plaintiff appeals.

*M. W. Devine*, for *applt.*

*Horace Russell*, for *respts.*

*Held*, That the United States District Court, in relation to proceedings in bankruptcy, is a creature of the statute, without either equity or common law powers. It cannot transcend the jurisdiction of the written law which created it. 4 Cranch, 75; Bankrupt Law, March 2, 1867.

As the order for the bond was not expressly authorized by the



statute, it can only be sustained as an act of judicial discretion.

The authorities upon which the appellant relies do not sustain the proposition of judicial discretion for which he contends, viz.: Nat'l Bank R., 491; 12 id., 403; 3 Hughes, 662.

An order of a court purely statutory in character, and not expressly authorized, is not within the line of judicial discretion. The warrant was issued August 16, 1873, and was executed by the marshal on that day. If such process was issued in conformity with the statute, without requiring security, it is evident, in the absence of any statutory direction in this respect, that the defendants were entitled to an adjudication of their rights upon the papers before the bankruptcy court without any exceptions or conditions not mentioned in the statute.

The bond was not given by expressed direction of the statute, and was not within the limit of a judicial discretion that imports consideration.

Judgment affirmed.

Opinion by *Larremore, J.*; *Daly, Ch. J.*, and *Beach, J.*, concur.

## APPEAL. PRACTICE.

### N. Y. COURT OF APPEALS.

*In re* estate of Boston, deceased.

Decided June 24, 1884.

On appeal from a surrogate's decree adjudging an administrator in contempt appellant procured extensions of the time to file return. Pending such extensions the appeal was dismissed for failure to serve

papers. Thereafter appellant procured a stay from the surrogate to allow him to pay or surrender himself, but did neither. On a subsequent motion to set aside the order dismissing the appeal, *Held*, That under the circumstances of delay and acquiescence the court could not interfere.

This was a motion to set aside an order granted May 13, 1884, dismissing an appeal for failure to serve printed papers.

In June, 1883, proceedings were commenced before the surrogate of the City and County of New York to punish L., who was temporary administrator of B., for his failure to comply with a decree of the surrogate made November 19, 1881, requiring him to pay to M., the administratrix of B., \$5,218.68. Said proceedings were continued before said surrogate until October 29, 1883, when a warrant was issued by the surrogate to imprison L. for his contempt in failing to pay M. \$893.68 with interest from November 19, 1881, which was the balance L. had failed to pay. On October 30, 1883, L. procured a stay and appealed to the General Term from the surrogate's decree, which appeal was argued in 1884. In March, 1884, the General Term affirmed the decree; L. then procured a stay until he could perfect an appeal to the Court of Appeals, which he did on March 18, 1884. When twenty days had elapsed after the perfecting of the appeal, no return having been filed with the clerk, the respondent's attorney caused a written notice to be served on the appellant's attorney, requiring him to cause a return to be filed in ten days from

the date of the service of said notice. On April 21, 1884, the appellant's attorney procured an order extending the time to file the return until April 29, 1884. On that day the appellant's attorney procured another extension of five days. On May 5, 1884, appellant's attorney procured a further extension of ten days, making in all fifty-three days. On April 18, 1884, forty days after the appeal had been perfected, the respondent's attorney caused a written letter to be served on the appellant's attorney, requiring copies of the printed papers on said appeal to be served within ten days, according to Rule 7 of the Court of Appeals, and in case of a failure respondent would have said appeal dismissed. After the ten days had expired, the notice not having been complied with, respondent's attorney made an affidavit of the facts and sent it with the original notice to serve printed papers, on which was indorsed an admission of service by the appellant's attorney, and proof by affidavit of its service, to the clerk of the Court of Appeals, asking for a dismissal of the appeal. The clerk dismissed the appeal on May 13, 1884, and as soon as respondent's attorney received notice of such dismissal he notified the appellant's attorney. On May 17, 1884, the order of dismissal was made the order of the Supreme Court, and both orders were filed with the clerk of the Surrogate's Court. On May 21, 1884, the appellant's attorney obtained an *ex parte* order from the surrogate

staying the proceedings of the administratrix and the sheriff under the warrant of attachment until twenty days had elapsed from the dismissal, to allow the appellant to pay said money or surrender himself to the sheriff. The twenty days expired on June 2, 1884, without the appellant having given himself up, as required by his undertaking, or paying said money. On June 3, 1884, the appellant's attorney obtained from a justice of the Supreme Court, *ex parte*, an order to show cause, with a stay on a motion for a stay pending the making of this motion to set aside the order of May 12, 1884, dismissing the appeal.

*Franklin Bien*, for motion.

*W. W. Culver*, opposed.

*Held*, That under the circumstances of delay and acquiescence appearing, the court could not interfere, and the motion should be denied.

Motion denied.

*Per curiam* opinion. All concur.

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#### DELEGATION OF AUTHORITY N. Y. COMMON PLEAS. GENERAL TERM.

*E. Ellery Anderson, applt., v. The Equitable Gas Light Co. et al., respts.*

Decided June 30, 1884.

The public powers and trusts devolved by law or charter upon the council or governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.

Appeal by plaintiff from judgment.

The defendant corporation was organized under the laws of this State. The plaintiff was a taxpayer and owner in fee of certain premises where the defendant corporation threatens and intends to lay its conductors, under the permission granted by defendant Thompson as Commissioner of Public Works of New York City. The plaintiff filed this bill praying a decree enjoining the defendant corporation from excavating the streets to lay its mains, and the defendant Thompson from granting the license. The bill also prayed an injunction *pendente lite*. The preliminary injunction issued, but was afterwards dissolved. The Special Term gave judgment for defendants, and the plaintiff appealed to this court.

The defendant corporation was authorized by law to lay conductors or mains through the streets, with the consent of the municipal authorities, and under such reasonable regulations as they might prescribe. Laws 1848, chap. 37, § 818. This consent was given under a general resolution passed by the Common Council December 23, 1876, granting it to all incorporated gas light companies upon such conditions as might be prescribed and approved by the Mayor, Comptroller and Commissioner of Public Works.

This is urged by the plaintiff appellant to be an unlawful delegation of legislative authority originally conferred by the sovereign power upon the Common Council.

*F. H. Man*, for applt.

*F. R. Coudert* and *J. N. Lewis*, for resp't.

*Held*, That power cannot be delegated. An inspection of the conditions implied in this instance by the officials named in the resolution shows the words of the act "under such reasonable regulations" as the municipal authorities may prescribe, to be practically synonymous with those in the resolutions, "upon such conditions" as may be prescribed.

"The public powers and trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." Dillon on Municipal Corporations, 2d ed., § 860, page 180; 43 Mo., 359; Id., 345; 1 Dutch. 309; 9 Barb., 152; 9 Daly, 357; 73 N. Y., 73; Id., 388.

While possibly the Common Council may not be required to annex regulations to the assent, if any shall be prescribed, their enactment is an exercise of judgment resting with the Council, and it alone. There is no provision of law authorizing the Mayor, Comptroller and Commissioner of Public Works to decide the manner or upon what conditions the defendant corporation may open the streets to lay its mains, and any permit founded upon their action in the premises confers no license and is void.

The court below concluded that the resolution of the Common Council was leaving the practical direction of the work to an execu-

tive department. But direction or supervision of work is not the prescribing of conditions upon which the work itself shall be done. The acceptance of such conditions by the corporation constitutes a contract between it and the city, and plainly exceeds mere ministerial supervision.

Judgment reversed and new trial ordered, costs to appellant to abide event; order dissolving injunction reversed with costs.

Opinion by *Beach, J.; Daly, Ch. J., and Larremore, J., concur.*

### WILLS. CONTINGENT DEVISE.

#### N. Y. COMMON PLEAS. GENERAL TERM.

Jane M. Leonard, *respt.*, v. Sophie Kingsland, *applt.*

Decided June 30, 1884.

When a testator devises real property to his son and said son's heirs, but if he dies without issue then to the testator's other children, it will be held that the contingency referred to is the death of the son in the lifetime of the testator, and by such son's survival he takes an absolute estate.

Appeal by defendant from judgment of Special Term.

The question at issue related to the title of certain real property, part of the residuary estate of one Kingsland, to which the defendant claims title under a deed from one Daniel Kingsland, a son of said testator. The testator devised his residuary estate, including the property in question, to his said son and to his heirs, the will also providing "but in case my said

son Daniel should die without lawful issue, I give and bequeath it to my remaining children share and share alike." The property left to the remaining three children of the testator was left to them for their natural lives only, and at their deaths to their children, if they have any, and, if not, to other persons who are designated. Said Daniel Kingsland survived the testator, and died prior to this controversy, leaving no issue, after conveying the property in question to defendant as aforesaid.

*Develin & Miller*, for applt.

*N. Quackenbos*, for respt.

*Held*, That the contingency referred to in the will of the testator, viz., the death of Daniel Kingsland, meant his death during the life time of the testator, and as he survived the testator, the contingency provided for never happened, and the residuary estate vested in him absolutely. When a devise or bequest is made to a person with a remainder over in case of his death, it is the general rule of construction that what is meant is his death during the life time of the testator. The testator having in contemplation the disposition to be made of his property at the time of his death, it is assumed, in the absence of anything in the will to the contrary, to have been his intention to make provision for a contingency that might happen between the time of making the will and that event. This is so unless there are controlling provisions in it, or from the whole tenor of the will it is evident that the intention was otherwise. 52 N. Y., 124; 8

Ves., 21; 68 N. Y., 233; 61 id., 50; 25 Wend., 119; 2 Strange, 1261; 2 Burr, 881; 37 Penn St., 461; 4 Ves., 160; Pre. Ch., 78; s. c., 2 Eq. Ca. Ab., 344, pl. 2; 2 Jarman on Wills, ch. 49, 2 Am. ed., pp. 468, 469, 500; 1 Roper on Legacies, 607, 608, 2d. Am. ed.

The reason of this rule is in part as above stated, but the law will never construe a remainder to be contingent when the estate can be taken to be vested. 25 Wend., 126.

The construction of the words "in case of death," etc., applies only where the prior gift is absolute and unrestricted, and not where the legatee takes a life interest only, for in the latter case it is assumed that the death referred to is the death that puts an end to the life estate; or, to express it differently, this construction applies only where the legacy is immediate, but made defeasible on the death of the legatee. 1 Roper on Legacies, 607; 2 Jarman on Wills, 666.

There is in this will an immediate and absolute devise to Daniel Kingsland defeasible only as has been stated, and separate life estates in each of the testator's other children—a distinction that is very material in the construction of the will, as tending to show that if it had not been his intention that Daniel, if he survived him, should have the residuary estate absolutely, he would have so expressed it, and given him, like the other children, a life estate only.

Judgment reversed.

Opinion by *Daly, Ch. J.*; *Beach* and *Larremore, JJ.*, concur.

## PROMISSORY NOTE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Henry P. Delafield, *applt.*, v. John White et al., *respls.*

Decided May 29, 1884.

In an action upon a promissory note the plaintiff produced it in court from his possession and testified that he had received it from one S., to whom it was made for a valuable consideration. S. on the other hand testified that he had transferred it to the plaintiff merely for him to collect. Payment to S., with the knowledge of the plaintiff before the transfer of the note to him, was set up as a defense, but evidence to sustain it was ruled out and the court charged the jury that all defenses as to indebtedness between the original parties were shut off; that the testimony upon the point of payment was excluded because the action was not between the original parties, and that they were to say whether the plaintiff had acquired a good title or whether he was not merely intended as a cover to prevent these equities from being set up in the case. *Held*, Error.

Appeal from a judgment entered upon a verdict in favor of the defendants, and from an order denying plaintiff's motion for a new trial made upon the minutes.

The action was brought upon a promissory note made by the defendant to one S., and transferred by S. to the plaintiff. The defenses set up were that the note had been paid to S. prior to its delivery to the plaintiff, that the plaintiff had notice of such payment, and that he was not the owner of the note. Testimony offered to prove payment was excluded by the court. The plaintiff produced the note in court and upon the question of its ownership testified that he had

received it from S. for a valuable consideration. S. on the other hand testified that he had transferred the note to the plaintiff merely for the purpose of having him collect it. The court charged the jury that all defenses as to indebtedness between original parties were shut off, that the testimony upon the point of payment was excluded because the action was not between the original parties, and that they were to say whether the plaintiff had acquired a good title or whether he was not merely intended as a cover to prevent these equities from being set up in the case.

*Albert Stickney*, for applt.

*Ira D. Warren*, for respts.

*Held*, Error. That to entitle a party to maintain an action on a promissory note he must be the legal owner and have the right of possession of the instrument. Such ownership must be sufficient to protect the defendant, upon a recovery against him, from a subsequent action thereon. That the possession and production of the note by the plaintiff raised a presumption of ownership and it appeared upon undisputed evidence that his possession of it was lawful, and that if it had been collected by him, S. would have been estopped from maintaining an action upon the notes against the defendants. That therefore a verdict should have been directed in favor of the plaintiff. 68 N. Y., 30.

That, even if there was a question of fact submitted to the jury upon a conflict of evidence between

S. and the plaintiff, then the jury were misled by the charge, for they were given to understand that the defense of payment was not a proper one as against the plaintiff, while on the contrary it was, and that the evidence sustaining it was ruled out for that reason, and the jury were then permitted to infer that the transfer of the note was made for the purpose of preventing the proof of such defense. 36 N. Y., 473; 44 N. Y., 248; 47 N. Y., 345; 74 N. Y., 486.

Judgment and order reversed and new trial granted.

Opinion by *Haight, J.*; *Daniels J.*, concurred. *Davis, P. J.*, concurred in the result.

## FALSE REPRESENTATIONS.

### N. Y. COMMON PLEAS. GENERAL TERM.

*Theresa H. Hickey, applt., v. John H. Monell, respt.*

Decided June 30, 1884.

The owner of property stored in a storage warehouse, which has been destroyed by a conflagration, cannot maintain an action, as for false representations, based upon a statement of the owner of the warehouse theretofore made by him to plaintiff, that the building was fire-proof.

Such a statement is not a statement of fact, but an expression of opinion.

Appeal from judgment.

On the 28th day of May, 1881, the plaintiff delivered to the defendant a quantity of personal property for storage in his warehouse. She had previously received a circular, issued by the de-

fendant, containing these words: "These buildings have been erected at an immense cost, and no expense has been spared to supply light, ventilation and protection against the spread of fire, the exterior being fire-proof and the interior being divided off by heavy brick walls, iron doors and railings, appropriate and convenient in every way for the various kinds of articles to be stored." The plaintiff before storing her property visited the warehouse, and was in a general way familiar with its exterior from frequently passing. In October, 1881, a fire originated in the stable opposite the warehouse on East Thirty-second street. The conflagration was exceptionally fierce, and the flames caught the wooden window frames of the warehouse, and it was burned with its contents, including the plaintiff's property. This action was brought to recover damages for false representations, fraud and deceit. The Court at Trial Term dismissed the complaint. From the judgment entered the plaintiff took this appeal. As the only proposition on this appeal is whether or not the statement in circular of the "exterior being fire-proof" is of a fact or the expression of an opinion.

*R. J. Underhill* and *Wm. Fulerton*, for applt.

*J. M. Bowers*, for resp't.

*Held*, That this point was properly passed upon by the Court below as a question of law. 53 N.Y., 298; distinguished.

*Further held*, That the disposition of the case was proper.

The statement that the exterior of the building was fire-proof gave no more than the defendant's judgment, and there is no proof from which to infer that he did not so believe and knew it to be false. To prove it false was impossible. No one could know it was fire-proof until trial was made, and consequently an assertion to that effect could be no more than an expression of an opinion.

If an affirmation is subject to verification or disproof, it states a fact. If not, and an effort to verify or disprove results in opinion, the original statement is of that character. Had the plaintiff investigated the laudatory recommendation of the circular, all possible for her to secure would have been—not the truth or falsity of a fact—but her own and others' opinions upon the exterior being fire-proof.

Representations held to be opinions, imposing no liability, are found in 2 *Espinasse*, n. p. 572; 5 *Exch.*, 779; 105 U. S. R., 553; 60 *Maine*, 578, and 4 *Black*, 57.

Judgment affirmed, with costs and disbursements.

Opinion by *Beach, J.*; *Daly, Ch. J.*, and *Larremore, J.*, concur.

#### MORTGAGE. BANK. FIXTURES.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The Manufacturers National Bank of New York, *agt.* John Rober and others.

Decided Sept.. 1884.

Under the National Banking Act a bank may take a mortgage to secure future advances to be made by the bank. The mortgagor or his creditors cannot defend against a loan because the amount exceeded one-tenth of the capital of the bank; it being no offense against the borrower, that the officers of the bank violated their duty.

This is an appeal from a judgment of foreclosure in favor of plaintiff.

The facts sufficiently appear in the opinion.

*Jackson & Burr*, for respts.

*James J. Rogers*, for applts.

*Held*, That the question whether under the National Banking Act a bank may take a mortgage for future advances to be made by the bank is finally settled by the Supreme Court of the United States, *Scooper vs. Leffingwell*, 105 U. S. Sup. Court Rep. 3, also by our Court of Appeals, *Simons vs. Bank of Union Springs*, 93 N. Y. 269. The defendants have no right to defend against the loan because the amount of it exceeded one-tenth of the capital of the Bank. If it was the fact it is no offence against the borrower that the officers violated their duty. They can be punished under the act, and it was not intended by the act to do more and permit the borrower to keep the money. The mortgage covers a parcel of real estate on which there were buildings for brewing purposes. The mortgage conveys the land and also all the "machinery, apparatus, tools, implements and other chattels in and upon said premises or which may during the existence of this mortgage be placed in and upon said premises and used by

the said John Rober (mortgagor), his heirs, administrators and assigns for the purpose of carrying on the business of brewing." It is claimed by the mortgagor that this is personal property and not covered by the mortgage. Rober the mortgagor cannot set up this defence. The transfer of the property is good as between the parties even if it be personal property and the mortgage had not been filed as a mortgage upon chattels. Neither are the judgment creditors in a position to set up the defense, for although they have judgments they have no executions and the mortgage is only void as to those who are creditors having judgments and executions, *Jones vs. Graham* 77, N. Y. 628. As a question of fact it was correctly decided by the trial judge that the articles were fixtures and passed with the land. Most of the articles in dispute were put upon the premises by a former owner, Mr. Illig. He sold these with the real estate. They were adapted to the business and place of business. They were mostly affixed to the realty. One article is so bulky that to remove it the building or part of it must be taken down although this article, a mash tub, is not actually affixed to the realty. As to the articles actually affixed and actually bought and sold with the land they are part of the land. The articles not actually annexed are bulky and are never designed to be moved from the place where they are and are adapted to the business of brewing at that particular place and in no



other, and this fact with the aid of the fact that the owner of the land so intended, the fixtures in question all go with the land.

Judgment affirmed.

Opinion by *Barnard, P. J.*, *Pratt* and *Dykman, J.J.*, concur.

### EVIDENCE. CODE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Peter R. Kelley, *respt.*, v. Horace T. Burroughs, *applt.*

Decided Sept., 1884.

Where a party is examined in his own behalf in respect to a transaction with a deceased party the adverse party is permitted to testify concerning the same transaction under § 829 of the Code, not only as to that part of the transaction so testified to, but as to any fact concerning such transaction.

Appeal from a judgment in favor of plaintiff by direction of the Court, in an action upon a note.

The facts sufficiently appear from the opinion.

*J. Stewart Ross*, for *respt.*

*Fisher & Valtz*, for *applt.*

*Held*, Assuming that § 829 of the Code applied to the case presented, still the testimony of the plaintiff was properly received. The action was upon a promissory note made by one Evans. The defendant was the first endorser and the plaintiff was the second endorser. The note was discounted by the Commercial Bank of Brooklyn. The bank recovered a judgment upon it against the administrator of the maker and against the two endorsers. The plaintiff paid the judgment and took up the note. Upon the trial

the plaintiff produced the note and rested. The presumption was that the maker passed the note to Burroughs for value and that Burroughs passed the note for value to the plaintiff. The defendant was sworn in his own behalf and testified that he was an accommodation endorser. This was an examination in his own behalf in respect to the note of the deceased, and the plaintiff was at liberty, under this section, to testify "concerning the same transaction." The plaintiff testified that he was an accommodation endorser also, and that he presented the note to be discounted and paid the money over to Evans. Unless the defendant had been sworn in relation to the note the testimony of the plaintiff is unnecessary. The note entitled him to judgment. If he did receive the proceeds, he was presumptively entitled to do so, and still hold the maker and endorser prior to himself, on it. The defendant changed this presumption by his testimony, and it was competent for the plaintiff to speak of the same transaction which included his connection with the note and not only that part of the transaction which affected the defendant's position thereon. He could testify to facts which made the defendant liable even as an accommodation endorser. *Sweet v. Eddy*, 28 Hun, 432. There was no dispute as to the facts, and the Court properly directed a judgment for the plaintiff. Such a disposition is proper when a verdict, if found by the jury for the defendant, would have been set aside

as against the evidence. This was such a case.

Judgment affirmed.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs.

### NEGLIGENCE.

N.Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Charles E. De Kay, *respt.*, v. New York, Lake Erie & Western R. R. Co., *appls.*

Decided Sept., 1884.

Railroad Companies are bound to protect their employees who are required to couple cars, by providing safe and strong bumpers, and this duty is not dependent upon the fact whether or not the cars are owned by the defendant.

This is an appeal from a judgment in favor of plaintiff.

The facts sufficiently appear in the opinion.

*T. J. & J. W. Lyon*, for applt.

*Lewis E. Carr*, for respt.

*Held*, That it appears that the plaintiff was an employee of the defendant and was injured in the discharge of his duty in coupling cars for the defendant. It appeared upon the trial that the cars in question were both from other railroads, which in the course of business were being passed over the defendant's road by defendant. That one of the cars had what is known as a draw bar for a single link coupling, and the other car had a hook instead of a draw bar, and the two cars could not be connected only by a three link chain. In the process of coupling the cars

were pushed together, and when they came together, and while the plaintiff was holding a heavy chain to throw over the hook, the draw-head of one car rode over the hook of the other, and the plaintiff's hand was crushed. One of the cars had bumpers eight inches square and nine inches deep, and the other had a plank not exceeding five inches in thickness over the draw head. The ordinary bumper would have prevented the accident. The draw-bar could not have ridden over the hook, because the bumpers, if such as were commonly used, would have come together before the cars could come together so as to injure the brakeman. The Court of Appeals in *Ellis v. The N.Y., L. E. & Western R. R.*, held that the company was bound to provide buffers in case of collision to protect the employees, much more is it a duty to provide for the employee who is required to couple the cars, against the manifest dangers of the business, so far, at least, as to furnish safe and strong bumpers to prevent the actual collision of the cars. This duty is not dependent upon the fact whether or not the cars are owned by the defendant. It furnishes all the cars it draws over its road.

*Gottlieb v. N. Y. & Erie R.R.*, 29 Hun., 639.

Judgment affirmed.

Opinion by *Barnard, P. J.*; *Pratt* and *Dykman, J. J.*, concur.

## BILL OF PARTICULARS.

N. Y. COMMON PLEAS. GENERAL TERM.

The Orden Germania, *respl.*, v. Charles E. Devender, *applt.*

Decided June 30, 1884.

The complaint set forth the incorporation of plaintiff, a mutual benefit association, and that defendant was the treasurer of its grand lodge between the dates therein referred to; that during said time moneys were paid by various branch lodges on plaintiff's account to the financial secretary, from whom it was defendant's duty to collect it; it then proceeds in various counts to charge that defendant either wrongfully converted \$2,000 to his own use during said period, or by wrongful neglect of his office and duty permitted said financial secretary to so convert such sum. *Held*, That defendant was entitled to a full bill of particulars both of moneys received and paid by him and by said financial secretary, giving dates, amounts, names, etc.

Appeal from order denying motion for bill of particulars.

The complaint alleged the incorporation of plaintiff, a mutual benefit association, and that defendant was treasurer of its grand lodge between the dates therein referred to. It also alleged that during said time large sums of money were paid to the financial secretary on plaintiff's account, from which said secretary it was defendant's duty to collect it; and the complaint then proceeds in various counts to show that defendant either wrongfully converted \$2,000 thereof to himself, or by wrongful neglect of his official duty, permitted said financial secretary to so convert to his own use said sum.

*Gustavus Levy*, for applt.  
*Kaufmann & Sanders*, for resp't.

*Held*, That defendant was entitled to a bill of particulars, the statement in the complaint being too general. It is no answer to the application to say that defendant is presumed to know what moneys he has collected and what he has paid over. There is no presumption that he has information of moneys which he has collected but has not accounted for, because it is not to be presumed in advance of the trial that he has been guilty of such a breach of trust, and that he therefore must know the particulars of his guilt. He is certainly not presumed to know what a third party, the financial secretary, has collected and failed to account for. The bill of particulars should show what sums it is claimed were received by the financial secretary of plaintiff between the dates referred to in the complaint, from branch lodges of plaintiff, giving dates, amounts, and from what lodges received; also showing what sums it is claimed were received for plaintiff by defendant as its treasurer, giving dates, amounts, and from whom received; also showing what sums it is claimed were paid over by the financial secretary to defendant and by defendant to plaintiff.

Order for bill of particulars granted as above, with \$10 costs of motion and \$10 costs of appeal, and disbursements.

Opinion by *J. F. Daly, J.*; *Beach, J.*, concurs.

**JURISDICTION. ACTION.  
PARTITION.**

**N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.**

**Emily A. Kimball et al., *respts.*,  
v. Leonard Mapes et al., *appls.***

**Decided Sept., 1884.**

Where the object of two legal proceedings is the same the proceedings should be continued in the case where process was first issued, and the fact that the second action was commenced without notice of the pendency of the first does not alter the rule. The court obtains jurisdiction in an action to partition lands, although there is no land situate in the county where the summons and complaint named as the place of trial.

This action was brought to partition certain premises situate in New York, Kings and Queens Counties. The summons without a complaint was served on two of the defendants. Westchester County was named as the place of trial. No part of the real estate sought to be partitioned was situate in Westchester County. Before the service of summons on the defendant Henry C. Mapes, and before the complaint or lis pendens were filed, he commenced an action for partition by service of summons and complaint and filing lis pendens, the venue being laid in New York county. Henry C. Mapes, by answer in the present action, raised the issue of another action pending. Plaintiffs moved for stay of action of Henry C. Mapes, and for a receiver, which was granted, and from which order this appeal is taken.

*Jas. C. De La Mare*, for respts.  
Vol. 19.—No. 21.

*Hughes & Baker* and *A. M. & G. Card*, for applts.

*Held*, That although the action was one for partition of lands, and therefore local, the court had jurisdiction of the action. The fact that no lands were situate in the county which the summons named as the place for trial did not take away jurisdiction of the action. It still might be tried there unless the objection was taken in due form. Code, §§ 985, 986. This action was commenced first. The summons was served on two of the defendants before the second action was commenced. That the plaintiffs commenced the second action in ignorance of the fact that the first had been commenced does not change the rule which governs the case. 48 N. Y., 62.

The suit first brought is the proper one in which to compel all creditors to come in and prove their claim and close a trust when there is such an action brought by a creditor in his own behalf and in behalf of all others similarly situated. 67 N. Y., 542.

When the object of two legal proceedings is the same, and the proceedings are in different courts, the proceedings shall be continued in that court "whose process was first issued." 86 N. Y., 270.

Both these actions are in this court, and an order to stay all proceedings in the second action was proper. 67 N. Y., 542.

This action was commenced by the service of the summons upon two of the defendants. It is the commencement of the action which

determines the rights of the parties in respect to the question presented, and not whether the second action was commenced without notice of the pendency of the first action. It is immaterial whether the action was commenced as to the second plaintiff without service on him; process was issued in the first action and served on some of the defendants.

Order affirmed, with costs.

Opinion by *Barnard, P. J.*; *Pratt, J.*, concurs; *Dykman, J.*, not sitting.

### NEGLIGENCE.

N.Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Charles W. Cooke, *respt.*, v. The Lalance Grosjean Mfg. Co., *applt.*

Decided Sept., 1884.

It is negligence in the master who employs children under 16 years of age to manage dangerous machinery, and the rule that makes all employees assume the risk of the employment does not apply to infants under the prescribed age who are injured in managing dangerous machinery unless such infant by his or her negligence contributed in some degree to the injury.

This action was brought to recover damages for injuries received by a child under 16 years of age while operating a machine; being at the time of the injury in the employ of defendant.

Judgment was entered upon verdict of jury in favor of plaintiff and defendant appeals therefrom.

*C. J. Patterson*, for *respt.*

*Morris & Pearsall*, for *applt.*

*Held*, That in the case of *Hickey v. Taafe*, 32 Hun, 7, we came to the conclusion that Chap. 122, Laws of 1876, applied to all industrial occupations in which children under 16 years of age were put to attend dangerous pieces of machinery; that the prohibition against such employment of children was a violation of a rule of safety and was therefore negligence in the master; that the rule which makes all employees assume the risks of the employment does not apply to infants under the prescribed age who are injured in managing dangerous machinery unless such infant by his or her negligence contributed in some degree to the injury. This case involves no new principle or question essentially different from the case of *Taafe*. A piece of machinery is dangerous within the meaning of that act when it is of such strength or power or so complicated that it is improper to place an immature judgment to manage it, and when an error either in judgment or skill will cause very violent injury. We thought that the legislature intended to forbid young children from being so employed.

The question of the contributory negligence of the plaintiff was properly sent to the jury. There was some evidence tending to show an imperfect machine, but as the court charged the jury that if the machine was dangerous it was negligent in the defendant to put the plaintiff to manage it whether it was in repair or not,

there would necessarily be a new trial if this charge was wrong.

Judgment affirmed.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs.

## ATTORNEY AND CLIENT. FALSE IMPRISONMENT.

N. Y. SUPERIOR COURT. GENERAL TERM.

Miles Gearon, *applt.*, v. The Bank for Savings, *impld.*, *respt.*

Decided April 7, 1884.

The client is not liable for the act of his attorney in directing the sheriff to arrest the wrong person under a warrant of attachment issued in the action, it not appearing that such client gave special authority, express or implied, to the attorney to arrest such person, or ratified the act of the sheriff in so doing.

Appeal by the plaintiff from a judgment in an action for false imprisonment, dismissing the complaint on the merits without costs.

An order was made in a certain action in the Supreme Court in which the present defendant was plaintiff, requiring one G., who was one of the defendants and also attorney for another of the parties thereto, to pay certain moneys in his possession to a receiver appointed by the court. Service of this order was made on a person then supposed to be G., and the money not being paid in obedience to this order, a warrant of attachment was issued directing the sheriff to attach the person of said G. The sheriff's officer applied to the attorneys of the plaintiffs in that action for instructions, and

they sent with him one of their clerks to an office in this city, where the sheriff's officer, acting under the instructions of this clerk, arrested the plaintiff in the present action, being informed by said clerk that the person so arrested was said G., and plaintiff was held in custody by the sheriff all night and until the next morning, when he was discharged on proof that he was not said G., the person named in the attachment, but his brother, M. G., the plaintiff in the present action.

There was no evidence of any special authority from the plaintiff in that action to their attorney or to the sheriff to arrest M. G.; nor was there any subsequent ratification by the bank of the act of the sheriff, or of their attorneys, after knowledge of that event.

*M. Gearon* and *Wm. H. Arnoux*, for *applt.*

*Strong & Cadwalader*, for *respt.*

*Held*, That the complaint was properly dismissed. When, after having issued execution, the attorney undertakes to give special directions for its enforcement in a manner not warranted by the language of the writ, and when the officer may justly decline to take the responsibility, in the absence of indemnity, the client can be held only on proof of special authority to the agent, express or implied, or of subsequent ratification, with knowledge of the facts. 48 Super. Ct., 169. This marks out the limits within which the plenary power of the attorney, under his ordinary retainer, is confined.

The attorneys for plaintiff in the former action caused an attachment issued by the court to take the person of G. to be unlawfully executed by taking the person of his brother. That was an act also outside the limits of their employment, and for which their clients were not responsible. Indeed, on the issue of the attachment and its delivery to the sheriff for execution the employment of the attorneys as to that attachment ceased. It was no part of their duty to instruct the sheriff how the attachment should be executed.

The burden of proving special instructions from the defendants here to their attorneys, or to the sheriff, to arrest the plaintiff, was on the plaintiff, and no such proof was given.

Judgment affirmed, with costs.

Opinion by *Freedman, J.*; *O'Gorman, J.*, concurs.

#### PARTNERSHIP. ACCOUNT- ING.

N. Y. COMMON PLEAS. GENERAL  
TERM.

S. Tolan, *applt.*, v. John F. Carr, *respt.*

Decided June 30, 1884.

If one partner by a secret transaction within the line of the firm's business derives a private benefit to the detriment of the firm, he will be compelled to account therefor.

Appeal by plaintiff from judgment.

Action for copartnership accounting.

The parties hereto were formerly partners as dealers in lum-

ber. At that time defendant made a contract with the firm of M. & I. H. Murray.

A note of Tolan & Carr (the firm of the parties hereto), payable in 30 days, for a part of the purchase money, was delivered to the firm by defendant at the time when the order for the lumber was given, and they gave defendant a receipt for it. It was a contract for a certain quantity of lumber, and the amount and quality were specified. In May, 1880, following, the plaintiff and defendant agreed upon a dissolution of their copartnership, and this contract upon which there had been some deliveries was among the outstanding contracts of the firm, the business of which, after the dissolution, as was agreed upon, was to be settled by the defendant Carr. The plaintiff thereafter, without the knowledge of defendant, and in bad faith, induced the firm of M. & I. H. Murray to repudiate their contract with Tolan & Carr, and the lumber that should have been delivered in fulfillment of it they delivered to the plaintiff Tolan upon an alleged individual contract thereupon entered into with him, and he received the residue of the lumber and all the benefit derived from it.

*Seaman & Conger*, for *applt.*

*J. H. V. Arnold*, for *respt.*

*Held*, That the referee was right in holding that the plaintiff should account to the defendant for his (defendant's) share in the profits derived from the purchase by and delivery to plaintiff of this lumber.

The contract of partnership is one of mutual interest, respect, confidence and good faith; and it is a familiar rule, that if one partner, by a secret transaction like this, derives a private benefit to the detriment of the interest of the firm, he will be compelled in equity to account for it to the partnership. 61 N. Y., 126; 45 id., 318; Story on Partnership, c. 9; 8 De Gex, McN. & G., 787.

Judgment affirmed.

Opinion by *Daly, Ch. J.*; *Larremore* and *Beach, JJ.*, concur.

## FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James Jackson, receiver, *respt.*,  
v. The St. Paul Fire and Marine  
Ins. Co., *applt.*

Decided May 9, 1884.

When a policy of fire insurance declares that any misrepresentation whatever, either in a written application or otherwise, shall avoid the policy, the fact of such misrepresentation is entitled to have the same effect, when relied upon as a defence, as it would have if the defence of a breach of warranty was set forth in the answer.

A description in an application for insurance of the property to be insured as "a story and a half hard finished boarding house building" is a representation that both the first story and the half story above it were hard finished; and if, in fact, only the first story was hard finished, while the half story above was what is known as "cloth finished," such description is a misrepresentation of a material fact which avoids the insurance.

In an action by one insurance company against another on a policy of reinsurance issued by the latter, the reinsuring company is not estopped from setting up as a

defence a false representation made by the agent of the first insurance company and the application for reinsurance by the fact that, in an action by the assured against the first company, which resulted in favor of the plaintiff, and in the defence of which counsel for the reinsuring company took part, the same false representation was set up as a defence as having been made by the assured.

Appeal from judgment recovered upon trial before the Court without a jury.

The plaintiff, who was the receiver of the Patterson Fire Ins. Co., brought this action upon a policy of reinsurance issued by the the defendant to the Patterson Co., to recover the amount paid by the said Co. upon the policy so reinsured by the defendant. The policy of reinsurance provided that "any false representation by the assured of the condition, situation, occupancy, etc., of the premises" should render the insurance void, and the answer set up as a defence that the agent of the Patterson Ins. Co. in the application for reinsurance had falsely represented the property to be "a story and a half story hard finished boarding house building." It appeared upon the trial that only the first story of the building was "hard finished," *i. e.*, finished with lath and plaster, while the half story above was finished by having muslin stretched over the beams and covered with paper, which was known as "cloth finish," and it appeared also that this was a fact material to the risk, for the insurance of which a higher premium would have been exacted.



*N. B. Hozie*, for applt.

*Preston Stevenson*, for respt.

*Held*, That, although no breach of warranty was alleged in the answer, the alleged misrepresentation concerning the condition of the building was relied upon, as it could be under the policy, as a false statement by way of defence, and where the policy has declared, as was done in that of the defendant, that any misrepresentation whatever, either in a written application or otherwise, should avoid the policy, the fact is entitled to have the same effect, when relied upon as such, as it would have if the defence of a breach of warranty was set forth in the answer. 87 N. Y., 69.

67 N. Y., 595, distinguished.

That the description of the property to be insured made in the application for reinsurance was in such language as to include the whole building, and to convey the impression that both the story and the half story were finished in hard finish, and, since that was not the case, was a misrepresentation which avoided the insurance under the terms of the policy. 58 Barb., 325; 7 Hun, 659; 20 N. Y., 52; 3 Seld., 370.

The Patterson Co. had been sued by the assured, and in that action, with the knowledge and consent of this defendant, had set up as a defence that the assured had made this same misrepresentation to it, and in the defence of that action counsel for this defendant had participated, but without formally appearing for it. That ac-

tion resulted in favor of the plaintiff therein, and it was claimed by the plaintiff in this action that this defendant was concluded thereby.

*Held*, That even if this defendant should be held to be bound by the judgment in the action against the Patterson Ins. Co., still it would not be concluded from making the defence presented by it in this action, for such defence was entirely distinct and different from that presented and considered in the action brought against the Patterson Co., for it depended upon the fact that the misrepresentation was made by the Patterson Fire Ins. Co. itself to the defendant, while that made in the action against the Patterson Fire Ins. Co. depended wholly upon the alleged fact that the person insured had made a similar misrepresentation to the Patterson Co., and a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it and the law and the facts necessary to uphold it. 44 N. Y., 1, 13, 14.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Haight, J.* concurred; *Davis, P. J.*, dissented upon the ground that the words "story and a half story building" related to and were only a description of the size of the building, and the words "hard finished" did not necessarily assert that the building was so finished throughout.

## JOINDER. PLEADING. FALSE REPRESENTATIONS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Emily De Silver, *respt.*, v. Howard Holden, *applt.*

Decided April 7, 1884.

A cause of action that defendant by false representations induced plaintiff to sign a bond for the payment to a third person of a certain sum of money and a mortgage on her real estate securing it, which were delivered to such third person, defendant receiving and retaining the money therefor, under Code, § 484, sub. 6, may be joined with a cause of action for conversion, since plaintiff had a property in the bond after execution and before delivery which was tortiously taken from her by defendant.

An averment that, with intent to deceive plaintiff, defendant falsely and fraudulently represented certain matters of fact as to his property and financial standing, implies a charge that defendant knew the representations to be false, the matters referred to being presumably within his personal knowledge.

Appeal from final judgment in favor of plaintiff, entered upon an order and interlocutory judgment overruling defendant's demurrer to the complaint.

Defendant demurred on two grounds: 1. That causes of action are improperly united. 2. That the allegations as to the first alleged cause of action are insufficient, &c.

The first cause of action was, that by false and fraudulent representations the defendant induced the plaintiff to sign a bond conditioned for the payment of \$1,700, and also a mortgage upon plaintiff's real estate, to secure the payment of the bonds which were made to a third person by defend-

ant's request, to whom defendant delivered them, receiving therefor from the third person \$1,700. The other cause of action was for the conversion of personal property belonging to plaintiff.

Appellant contended that the joinder is not justified unless by subdivision 6 of § 484, Code Civ. Pro., that provides that the plaintiff may unite causes of action for injuries to personal property; that the first cause of action was not for an injury to personal property.

*E. P. Wilder*, for *applt.*

*C. Bainbridge Smith*, for *respt.*

*Held*, That there was no misjoinder. Fraud is a wrong, and if a party thereby obtains from another property it is an injury to the property of such other in the same sense precisely as though the wrongdoer had taken it tortiously and converted it. 59 Barb., 374. The bond signed by the plaintiff was her property, and the complaint alleges that the defendant obtained it from her by false pretences. This only affected personal property, for the mortgage which affected the real property was distinct and different from the bond. She had a property in the bond after she signed and before it was delivered to the obligee by the defendant. 12 N. Y., 313.

It was urged that the complaint did not state that defendant knew the representations made by him to be false.

*Held*, That as the complaint averred that, with intent to deceive and defraud the plaintiff, defendant falsely and fraudulently stated

and represented certain matters of fact as to his own financial condition and as to property owned by him, these were things that the law would presume were within his knowledge, and such averments imply a charge that the defendant knew the representations to have been false, or that he knowingly made them. 83 N.Y., 28.

Judgment affirmed, with costs.

Opinion by *Sedgwick, Ch. J.*; *O'Gorman, J.*, concurs.

### MURDER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People, *respts.*, v. William Conroy, *applt.*

Decided June 13, 1884.

Conroy, who was a policeman in the City of New York, entered a saloon in that city in the evening with a friend for the purpose of taking a drink. He was peculiarly susceptible to the influence of liquor, and after drinking a glass of sherry, became quarrelsome. This mood passed over, however, and he invited the persons in the saloon to drink, which they did, and he himself took another glass of sherry, after taking which his quarrelsome humor returned, and he became involved in an altercation with a person present, whom he knocked down and commenced kicking. The others in the room demanded that he let the person up, and they all gathered around him. Conroy, thereupon, drew his policeman's club and his revolver also, according to some witnesses, and most of the persons in the saloon retreated into an adjoining card room, and shut a glass door between the rooms. Conroy then broke a pane of glass in this door with a blow of his club, and immediately a pane was broken from the other side. Conroy then fired, or, as one witness stated, first replaced his club, threw

back his coat, and, after drawing his revolver with some difficulty, and although seized by one person present, who exclaimed, "Don't shoot, Billy, these are my friends!" turned partly round, and quickly fired in the direction of three persons standing together, hitting one of them, with whom he had had no controversy, in the abdomen, inflicting a wound from which he subsequently died. After wounding the deceased, Conroy arrested him and took him to the police station, where he stated that he had arrested him for being drunk and disorderly, and that he had been attacked by a crowd and his prisoner rescued, and, upon being asked by the sergeant whether the man was shot, answered, "I don't know; if he is not, it is not my fault; I tried hard enough to shoot him," *Held*, No evidence of such a "deliberate and premeditated design" to kill as to constitute murder in the first degree.

Appeal from a judgment of the Court of General Sessions of the County of New York, convicting the defendant of the crime of murder in the first degree.

The defendant, who was a policeman in New York City, entered a saloon in that city one evening, in company with a friend, for the purpose of taking a drink. He was peculiarly susceptible to the influence of liquor, and immediately after taking a glass of sherry, became very quarrelsome and entered into an altercation with one C. who was in the saloon, and offered to fight any one present for money. This mood passed over, however, and he invited every one to drink, which they did, he himself taking another glass of sherry. He immediately became quarrelsome again, and disputed the amount of his bill, and upon asking one M what he had had to drink, and upon being answered "mixed ale," called M. a liar; and

upon M.'s retorting, knocked M. down and commenced kicking him. The crowd demanded that M. be let up, and gathered around the defendant. M. thereupon got up and fled from the saloon, and the defendant drew his policeman's club, and, according to the testimony of some witnesses, his revolver also. Most of the people in the saloon here retreated into an adjoining card room and shut a glass door between the rooms. One of them protruded his head, and Conroy struck at it with his club, missing it and breaking a pane of glass in the door. Immediately afterward a pane was broken from the other side. Conroy drew back and fired, or, according to the testimony of one witness, first replaced his club in his belt, threw back his coat, and with some difficulty, according to the testimony of one witness, drew his pistol, and although seized by a person present, who exclaimed, "Don't shoot, Billy; these are friends of mine," turned partly round, and quickly fired in the direction of three persons who were standing together in the saloon, hitting one of them, with whom he had had no previous controversy, in the abdomen and inflicting a wound from which he subsequently died. He then arrested this wounded person, and dragged him to the police station, where he stated that he had arrested him for being drunk and disorderly, and that he had been attacked by a mob and his prisoner rescued, and upon being asked by the sergeant whether the man was shot,

answered: "I don't know; if he is not, it is not my fault; I tried hard enough to shoot him." The defendant was indicted, tried, and convicted of murder in the first degree under sub. 1 of § 183 of the Penal Code.

*Wm F. Howe*, for applt.

*John Vincent*, Asst. Dist. Atty., for People.

*Held*, That there was no evidence to justify a finding of "deliberate and premeditated design" to effect the death of any person. That it is palpable either that the defendant fired without mental concentration upon any individual object, but recklessly and in utter disregard of human life; or that, fearing an attack, he acted upon a sudden impulse to strike terror into the crowd by firing at the first person who stood before or about him. The extreme rapidity of his movements, the absence of threats, pre-existing ill-will, or motive, the presence of self-aroused passion and sudden violence, the inappreciable space of time between the act and the earliest previous moment when it is possible to assume the flash of design; the unreasoning, senseless and frenzied condition of his mind, all tend absolutely to exclude the idea of deliberation. 29 Hun, 382; 88 N. Y., 196; 91 N. Y., 211; 92 N. Y., 85; 10 Abb. N. C., 261, distinguished.

That what afterward occurred gave no different color to the actual transaction. The defendant's statements at the police station were wholly false and were invented as an excuse for his miscon-

duct as an officer, and his statement that he tried hard to shoot the deceased was not intended to be anything more than an assertion that he tried hard to do his duty as against a mob of rescuers and an escaping prisoner. It is not to be detached from its context and distorted into an admission that he tried hard to shoot the deceased while he sat quietly in the saloon at the time he was wounded.

Judgment reversed and new trial ordered.

Opinions by *Davis, P. J.*, and *Brady and Barrett, JJ.*; *Brady, J.*, dissenting.

### CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*S. T. Dauchy et al., applts., v. Wm. H. Tutt, resp't.*

Decided Sept., 1884.

When a contract has not been fully performed, a payment will imply no change in the contract or bind the party when the payment was made under a false statement of the facts or even a mistaken view of them. While it may be that the payment cannot be recovered back, such payment cannot be used as a basis for recovery upon the contract as if performed.

Appeal from judgment entered upon the report of a referee dismissing the complaint.

Plaintiffs were advertising agents. Defendant was proprietor of "Tutt's Pills," and under a written contract employed plaintiffs to advertise his pills. The complaint is for an alleged balance

of \$4,159.50. The answer alleges failure to perform the contract.

By the contract plaintiffs were to insert defendant's advertisement in 634 papers. The advertisement to appear in all the papers in three months, and the position of the advertisement to be next to reading matter on local page. Papers refusing to give position to be deducted at the average price or other position selected at defendant's option.

Certain payments were made by defendant to plaintiffs on account. Certain papers refused to publish advertisement, plaintiffs offering goods in payment instead of cash, and in other papers it was not published for the prescribed time.

*Morris & Pearsall*, for applts.

*N. & M. Niles*, for resp't.

*Held*, That the contract which is the basis of the action is an entire contract. No claim arises upon it until it is substantially performed. It was not so performed in very essential particulars. The advertisements were not inserted within the stipulated time and in the full number of papers, nor published the full agreed time in a great many of the papers; nearly five-sixths of the papers published short time. There is evidence in the case from which it can be inferred that the reason so large a proportion of papers failed to publish the advertisement is to be found in the mode of payment offered by plaintiffs; goods instead of cash.

It was not known at the time of payment that the time of the publication was short in those papers

which did publish. In such a case the payment would imply no change in the contract or bind defendant when the payment was made under a false statement of the facts or even a mistaken view of them. While it may be that the payment cannot be recovered back, such payment cannot be used as a basis for recovery upon the contract as if performed.

Judgment affirmed, with costs.

Opinion by *Barnard, P. J.*; *Pratt* and *Dykman, JJ.*, concur.

### FRAUD. CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Hannah Strong, *respt.*, v. Edward Strong, *applt.*

Decided Sept., 1884.

An action at law will always lie to recover damages for a fraud without an offer to return the property received under the contract which was induced by the fraud. It is only when an action in equity is brought to set aside the contract for fraud that there must be a restoration of whatever was received under it.

Appeal from judgment entered upon report of referee for \$8,154.61.

This action was brought to recover \$10,000 for fraud and deceit alleged to have been practiced by defendant upon plaintiff, by getting her to accept his note for \$5,000, for the purpose of relieving himself from criminal liability, and in payment of a portion of the balance due her from defendant as executor of her father's estate, and obtaining a release from her of her claim against him as such executor.

Defendant in his answer denies the alleged fraud, and sets up the making of the decree by the surrogate on final accounting, by which defendant was released and discharged of and from all liability to plaintiff, and that said proceedings and decree were a bar to this action; and as a further defense defendant alleges that plaintiff never returned or offered to return property received under the settlement. Defendant also pleaded his discharge in bankruptcy.

*L. D. Fredericks*, for *applt.*

*Brown & Dykman*, for *respt.*

*Held*, That an action at law will always lie to recover damages for a fraud without an offer to return the property received under the contract which was induced by the fraud; it is only when an action in equity is brought to set aside the contract for fraud that there must be a restoration of whatever was received under it. The action seeks to put the parties back in the position they severally occupied before the fraudulent contract was made. The action at law is based upon a different principle.

The damages recovered for the fraud, with the property received, makes the parties even. There is no basis for the claim that the principle of *res adjudicata* will protect the defendant. The claim which plaintiff made against the defendant was one growing out of her rights in her father's estate, of which defendant was executor. The decree was based upon the settlement of the parties. Defendant was to convey certain lands to

plaintiff and pay \$5,000 in one year from the settlement. Upon this arrangement the decree was entered. The decree will not be held to have the effect to establish that the settlement was illegal, because upon the account rendered nothing appeared to be due plaintiff from her father's estate. Upon the settlement plaintiff was satisfied and the decree was entered as defendant wished, and not as she claimed it would have been if she had not been paid.

The only question left is one of fact. Did defendant, to induce the settlement, make a false statement as to his condition and solvency, and did plaintiff, relying upon the falsehoods, accept the offer made by defendant? Upon this question the preponderance of testimony is in favor of plaintiff.

Judgment affirmed.

Opinion by *Barnard, P. J.*; *Pratt, J.*, concurs; *Dykman, J.*, not sitting.

## NEGLIGENCE. MASTER AND SERVANT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Patrick Murphy, Jr., an infant, by guardian, *applt.*, v. William H. Mairs, *respt.*

Decided Sept., 1884.

Plaintiff was about twelve years of age and was employed in defendant's factory where wall paper is made. On November 29, 1883, he was working at heavy machinery and his hand was caught in it and crushed so badly as to necessitate partial amputation. An issue was made upon the question whether or not instruction had been

given to the boy as to how he was to do the work. *Held*, That this was a question for the jury without regard to the statute.

Appeal from judgment of nonsuit at Circuit.

Action to recover for injuries received by plaintiff while in defendant's employ.

A boy twelve years of age, ignorant of machinery, was put to work washing cloths upon a powerful machine in motion and without instruction. When it was desirable to change the pattern the old coloring had to be washed from the cloths, and this was done while the machine was in motion by throwing cups of hot water on the moving cloths. The cup slipped from the boy's hand, and in the effort to reclaim it he was caught in the machine and lost his hand.

*W. Howard Wait*, for *applt.*

*Charles J. Patterson*, for *respt.*

*Held*. That the question of the effect of Ch. 122, Laws of 1876, which provides that the employment of children under sixteen years of age in any business dangerous to the life and limb of such child shall be a misdemeanor was passed upon by the court in *Hickey v. Taaffe*, 32 Hun, 7; 19 W. Dig., 67. It was held that the statute in question made a new rule of duty to be observed by employers for the protection of children. That a violation of the statute made the employer liable for injuries received by a child employed in the forbidden business if the child was free from negligence.

It has long been the rule that when a child is employed on a

dangerous business without instruction as to the danger to be avoided and as to the manner of working safely it is a breach of duty on the part of the employer. Under each of these principles plaintiff was entitled to go to the jury. See also 19 W. Dig., 436.

If, therefore, the jury find that the employment was dangerous to the life and limb of the child, negligence was made out under *Hickey v. Taafe* against defendant without regard to the fact whether instruction was given or not of the danger to be apprehended.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Barnard, P. J.*; *Dykman* and *Pratt, JJ.*, concur.

### WILL. LEGACY.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

William E. Mapes, County Treasurer, *respt.*, v. The American Home Missionary Society, impled., *appls.*

Decided Sept., 1884.

A voluntary unincorporated association cannot, under the law of this State, take a legacy given to it under the will of a person domiciled in Connecticut, notwithstanding under the laws of that State the bequest would be good and the legatee could take. The capacity of the legatee to take and receive the bequest is to be determined by the laws of the State of New York and not by the laws of the State of Connecticut.

This is an appeal by defendant, The American Home Missionary Society, from that part of the judgment that provides that The American Home Missionary Society is

incapable of taking the legacy bequeathed to it by the will of Gilbert G. Waterbury, deceased. The testator, Gilbert G. Waterbury, died in 1856, and was at the time of his decease a resident of Connecticut.

By the ninth clause of the will the testator gave all his remaining estate to Benjamin Waterbury in trust to pay income to testator's wife, Naomi Waterbury, during her natural life.

By the tenth clause the will provided that "at the decease of my said wife" the remaining estate should be divided into three equal parts, one part to be applied to the charitable uses and purposes of said society.

At the time of the execution of the will and for several years after the testator's decease, The American Home Missionary Society was unincorporated (being incorporated in 1871), and had its domicile in New York.

The testator's wife, Naomi Waterbury, died in 1882.

The following provision is contained in the General Statutes of the State of Connecticut, in force at the time of and ever since the decease of testator, viz.:

"All estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public or charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever."



The question presented by this appeal is whether the capacity of The American Home Missionary Society to take the bequest was to be determined by the laws of this State, or by the laws of the State of Connecticut. Also, whether the property so given vested at the death of testator or took effect at the death of the life beneficiary.

*Nanny & Mead*, for resp't.

*J. B. & H. P. Wild*, for applt.

*Held*, That the property given by the tenth clause of the will vested at the death of testator. The words "at the decease of my said wife" have long been held to indicate a vested remainder with the time of payment in possession postponed until the future event happens. 52 N. Y., 118. Unless, therefore, the property given by this clause passed to some one person or corporation it went to the next of kin of deceased.

As an unincorporated association The Home Missionary Society could not take by our laws. 46 N. Y., 144; 88 N. Y., 357.

By the statute of Connecticut this bequest is good; by our law it is not; and which controls in respect to this bequest? The general rule is that while the execution of the will, the capacity of the testator and the construction of the instrument, is governed by the law of the domicile of the testator, yet the law of the domicile of the legatee govern the validity of the bequest. 43 N. Y., 424. That case, does not, however, seem to determine the question here. A testator in New York gave personal property to corporations en-

titled to take, in Pennsylvania, and the bequests were held good. It was stated in the opinion that a bequest bad at the place of domicile of testator would be bad everywhere. The bequest was not bad in New York then, nor is the bequest bad in the present case in the place of testator's domicile. The question seemed to turn, therefore, solely upon the power of the legatee to take. The treasurer cannot take because the fund is to be applied to the charitable uses of the society "under its direction." Unincorporated associations cannot be a trustee. 14 N. Y., 380.

A voluntary association for charitable purposes cannot, under the law of this State, take a legacy given to it. 1 Keyes, 561; 46 N. Y., 144.

Subsequent incorporation does not give effect to a legacy to an association unincorporated at the testator's death. 46 N. Y., 144.

The gift was, therefore, inefficient, and the title passed to the next of kin at testator's death and the representatives of such of them as have since died.

Judgment affirmed, with costs.

Opinion by *Barnard, P. J.*; *Pratt* and *Dykman, JJ.*, concur.

#### UNDERTAKING. CODE OF CRIMINAL PROCEDURE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The Board of Corrections and Charities of Kings County v. Philip Hammill et al.

Decided Sept., 1884.

An undertaking executed in any other case or manner than such as are provided by law are void.

A bond taken for a greater sum than required by the order of the magistrate of a person declared a disorderly person under §§ 899, 900 and 901 of the Code of Criminal Procedure is void.

Philip Hammill was declared a disorderly person and required to give an undertaking in the sum of two hundred and fifty dollars for his good behavior toward the people for one year and that he pay \$7 weekly for the support of his wife for one year, as provided by Chapter 395, Laws of 1871, amended by Chapter 171, Laws of 1882, applicable to Kings County. The bond taken was in five hundred dollars.

This action was commenced upon the bond and judgment recovered therein in excess of the proper penalty of the bond, from which judgment this appeal is taken.

*Held*, That obligations taken in any other case or manner than such as are provided by law are void. 2 R. S., 286, § 59.

The law requires a bond "in such sum as such justice of the peace shall direct with good and sufficient surety" for those purposes.

The order is the only basis for the bond and a bond in excess of the order is void under the statute above cited.

The sum mentioned in the order limits the powers of the officer; and if he exacts an undertaking for a greater sum the undertaking is clearly within the statute and void. 84 N. Y., 222; 80 id., 202. The surety can only be held for

the penalty of a bond, and if a proper penalty had been inserted in this bond the recovery would exceed it. The excess of the penalty of the bond beyond the order requires a reversal of the judgment.

Judgment reversed, with costs.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs; *Pratt, J.*, not sitting.

### DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

John C. Wallace, *respt.*, v. William S. Wallace, *applt.*

Decided Sept., 1884.

In order to authorize an order for the examination of a party before trial, under § 870 of Code, an affidavit must be presented showing the facts making the testimony material and necessary for the party making the examination. An affidavit stating that the testimony of such party "is material and necessary to deponent for the prosecution of this action, and in order to avoid the deponent's being surprised on the trial of this action by unexpected testimony" from the said party, is insufficient.

Appeal from order requiring defendant to appear and be examined as a witness before trial on behalf of plaintiff.

This action was brought to recover a portion of rent of a farm which defendant has collected and claims one quarter to be due to him.

The answer alleges payment and denies any indebtedness to plaintiff in any sum.

The only statement in the affidavit upon which said order was granted, as to materiality of the

testimony of plaintiff, is "that the testimony of said William S. Wallace is material and necessary to deponent for the prosecution of this action and in order to avoid deponent's being surprised on the trial of this action by unexpected testimony from the said William S. Wallace."

*William D. Dickey*, for respt.

*Daniel Finn*, for applt.

*Held*, That the affidavit fails to show any basis for an order to examine a party before trial. That no fact is given which goes to show the materiality of the witness.

The examination is based solely upon a desire to be informed what a party will testify to, which is not the object of the provision for the examination of a party. 16 Hun, 53.

Order reversed, with costs.

Opinion by *Barnard, P. J.*; *Dykman* and *Pratt, JJ.*, concur.

#### MUNICIPAL CORPORATIONS. LICENSE FEES.

##### N. Y. COMMON PLEAS. GENERAL TERM.

The Mayor, &c., of N. Y., *applt.*,  
v. *Gustave Miller*, *respt.*

Decided June 30, 1884.

Where a municipal corporation, or a department thereof, is authorized to make laws relative to a given subject, and to require of those desiring to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such license may be charged to the person desiring it, although such power is not expressly granted by the Legislature.

Appeal by plaintiff from judg-

ment. Action to recover penalty. The Consolidation Act of 1882, (sec. 456), provides that, among other explosive and combustible things, no ether shall be manufactured, stored or kept for sale in the city, except at such places, in such manner and in such quantities as shall be determined by the Board of Fire Commissioners, in the exercise of their discretion, under a permit by them granted therefor, and which is subject to be revoked at any time by the same board. The Board of Fire Commissioners established regulations, etc., and authorized the issuance of permits upon the payment of an annual license fee of \$2. Thereafter, defendant applied for a permit, and the Fire Commissioners offered to grant it for a year upon the payment of said fee, which the defendant refused to pay, and the permit was not issued to him. This action was then brought to recover the penalty for keeping ether upon sale without a permit, in which the Justice gave judgment for defendant, upon the ground that the Board had no right to demand a fee of \$2.

It was contended by respondent that this was imposing a tax for revenue, which the corporation has no authority to do. Appellant urged that it was simply a reasonable sum for defraying the expense attending the issue and recording of the license. It nowhere appeared what disposition was made of it.

*William L. Findlay*, for applt.  
*Wehle & Jordan*, for respt.

*Held*, That the judgment should be reversed. Whenever a municipal corporation is authorized to make laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such licenses may be properly charged to the persons procuring them, although the power to do so is not expressly given by the Legislature. 39 Conn., 140.

The regulation was for the security and safety of the citizens of New York against fire, and the small fee charged was a means of regulation and control, and simply a reasonable sum for defraying the expense attending the issuing and recording of the license. 52 N. Y., 324; 7 How., 82; 15 Ohio, 625.

The Board of Fire Commissioners is a department of the city government. The power to make the regulation was given to them by statute, and was exercised for the security and protection of those living within the municipality. If a large and unreasonable amount had been fixed there would be some ground for holding that it must have been imposed as a tax to raise revenue, which the Board of Fire Commissioners have no authority to do, but it is too small to warrant any such conclusion.

The cases of *Dunham v. Trustees, &c.*, 5 Cow., 468; and *Mayor v. Second Ave. R. R. Co.*, 32 N. Y., 261, are clearly distinguishable from the present one, where the

permit was instituted as a police regulation, by a department of the city government, clothed by the State with authority to make the regulation, in its discretion, and the small fee of \$2 required for the permit was a mere incident of the regulation.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Opinion by *Daly, Ch. J.*; *Larremore* and *Beach, JJ.*, concur.

#### COMMON CARRIER. CONDITION PRECEDENT.

N. Y. COMMON PLEAS. GENERAL TERM.

Gustav Hershberg, *applt.*, v. William B. Dinsmore, as president, *respt.*

Decided May 22, 1884.

A provision in a shipping receipt given by an express company, that it will not be liable for loss or damage unless the claim therefor is presented in writing within thirty days from the date of the receipt, etc., makes it necessary to show such presentation, etc., as a condition precedent to recovery, whether the action be on contract, or for conversion based on erroneous delivery.

Appeal from judgment of District Court in favor of defendant.

The action was for "damages for non-delivery of goods." On November 4, 1882, at Newark, N. J., one Mercy delivered to defendant's express company a package to be shipped to plaintiffs at New York, and received a receipt which contained the condition that in no event should the company be liable for any loss or damage unless

the claim therefor should be presented to them in writing within thirty days after the date of the receipt in a statement to which the receipt should be annexed ; the package was not delivered to plaintiffs, but through error was delivered to some person unknown; no claim whatever was made on the company within thirty days, but a claim was made some months afterward, at which time the delivery book of the company, which would show to whom the package had been delivered, had been lost.

There was some discussion on the appeal as to whether the action was for breach of contract of the carrier or for conversion ; and whether, if for conversion, the carrier could avail himself of the condition in the contract providing that the claim for loss must be made within thirty days. The demand as stated in the return was for "damages for non-delivery of goods."

*C. G. Moritz*, for applt.

*Blatchford, Griswold, Seward & Da Costa*, for respt.

*Held*, That though it has been said that a mere non-delivery will not constitute a conversion, and it would seem that the plaintiff's action is therefore stated on the contract, 70 N. Y., 400, yet it is of no consequence what the form of action is, since in *Smith v. Dinsmore*, 9 Daly, 188, it was held that in an action for conversion the thirty day clause in the shipping receipt (which clause was identical with the one now before us) was available to the carrier ; that

the presentation of claim for loss within the time specified was a condition precedent to recovery, and unless complied with, the action against the carrier could not be sustained. That case was decided upon another point, but the views expressed in the opinion on the point directly involved in the present case are in conformity with the authorities. 21 Wall., 264 ; 5 Phila., 355 ; 54 Miss, 566 ; 5 Hurl. & N., 867.

Judgment affirmed, with costs.

Opinion by *J. F. Daly, J.* ; *Larremore and Van Hoesen, JJ.*, concur.

#### TAXES. MANDAMUS. LIMITATIONS.

N.Y SUPERIOR COURT. GENERAL TERM.

People ex rel. Mary N. Townshend, *respt.*, v. Artemas Cady, Clerk of Arrears, *applt.*

Decided June 16, 1884.

A mandamus lies to compel a tax officer to receive a tax, although more than ten years have elapsed since the right to pay the tax accrued and the tax officer pleads the Statute of Limitations.

The tax once proved to exist will be presumed to continue to exist, and being a lien on the property until paid, Ch. 381, Laws 1871, § 1, the right to remove the lien continues also.

Appeal from an order and judgment awarding the relator a peremptory mandamus, compelling the appellant Cady, as Clerk of Arrears, to accept certain arrears of taxes for the years 1861, 1862, 1866, 1867 and 1868.

Respondent alleged the owner-

ship of the property, the assessment of taxes in the years mentioned above; that said taxes remain unpaid; that they were a lien on her land; that she had tendered appellant the amount of such taxes and the accrued interest, and that he had refused to accept the same. The appellant denied that said taxes remain unpaid, and admitted the other allegations, and pleaded the Statute of Limitations.

Appellant moved to dismiss the writ because, so far as it related to the taxes of 1861 and 1862, more than twenty years had elapsed since they were imposed and that the presumption of law was they were paid, and also because there is no proof the taxes were unpaid. He also moved for verdict on the ground stated in his answer that ten years had elapsed since the right to pay the taxes accrued. The appellant's motions were denied, to which, and also to the court's ordering a verdict for the relator, he excepted.

*George P. Andrews*, Counsel to the Corporation, and *John J. Townsend*, for applt.

*John Townshend*, for respt.

*Held*, That as it is admitted that these taxes once existed, in the absence of proof to the contrary, it must be presumed that they continue to exist. The Statute of Limitations does not discharge the debt; it simply bars the remedy on the debt. 14 N.Y., 20. It does not dispense with the performance of the contract. It is for this reason that such statutes have been held not to impair the

obligation of the contract. 4 Wheat., 207. It raises a bar to the action, which bar the obligor may use if he sees fit. It is personal to him as a defense.

*Further held*, That a mandamus will lie to compel the the tax officer to receive the tax. 92 N. Y., 591-5. It is a right inherent in the owner of the fee to have a lien on his property removed, and these taxes are a lien on this property until paid. Laws 1871, Chap. 381, § 1. This right continues while the lien continues, and therefore an action or proceeding to enforce this continuing right is not barred by the Statute of Limitations. 50 N. Y., 343.

Judgment and order affirmed, with costs.

Opinion by *Truax, J.*; *Sedgwick, Ch. J.* concurs.

### SECURITY FOR COSTS.

N. Y. SUPERIOR COURT. GENERAL TERM.

*Ann Fitzsimmons, applt.*, v. *Michael Curley, respt.*

Decided June 16, 1884.

Where defendant proceeds to trial without applying for security for costs from plaintiff, he thereby waives his right in that regard.

To compel plaintiff to give security for costs on the ground of non residence, it must be shown that when the action was begun he was a person residing out of the State, § 3268, Code, or that he ceased to be a resident of the State after the commencement of the action. § 3269.

Appeal from order requiring security for costs on the ground of non-residence.

There was no evidence that plaintiff was not, at the commencement of this action, a resident of this State. Defendant swore that one Johnson told him that plaintiff was living in the State of California, and had been living there for years. Mr. Bennett said that plaintiff resided in this State up to about a year ago, when, he is informed, she left on a visit to Portland, Oregon, and that she was expected back soon to resume her business as domestic, it thus appearing that she was a resident of New York when the action was commenced. The only evidence that she has ceased to be a resident since the commencement of the action is the statement of Johnson to defendant. In answer to that, McNeil informed Mr. Bennet that she is expected to return to New York soon, and was away on a visit.

*A. Pape*, for applt.

*Starr & Hooker*, for resp't.

*Held*, That it does not sufficiently appear that plaintiff is a non-resident. In order to require the plaintiff to give security for costs, it must appear, either, first that she was, when the action commenced, a person residing without the State (Code, § 3268), or second that after the commencement thereof she ceased to be a resident of the State, § 3269, Code Civ. Pro.

Defendant by proceeding with the trial waived his right to the security. So far as appears, he knew all the facts he has stated in his affidavit prior to commencing the trial, and knowing all those facts he proceeded therewith and did not make this application until the

judge had suspended the trial and ordered certain issues to be tried by a jury. It was then too late. 3 Civ. Pro. Rep., 432.

Order reversed and motion denied, with \$10 costs and disbursements.

Opinion *per curiam*; *Sedgwick, Ch. J.*, and *Ingraham, J.*, present.

## EXAMINATION OF PERSON.

N. Y. SUPERIOR COURT. GENERAL TERM.

Leo Newman, *applt.*, v. Third Avenue R.R. Co., *resp't.*

Decided June 16, 1884.

The Court has no power to compel a plaintiff who sues for damages from personal injuries to submit his body to an examination by a physician, for the purpose of proving his physical condition on the trial.

Appeal by plaintiff from order denying motion to vacate order for examination of plaintiff before trial.

Action for damages for personal injuries from negligence.

The order also directed that the "examination as to the physical and bodily condition of the plaintiff be by an actual inspection of the plaintiff's body and person. Such inspection and examination of plaintiff's body to be conducted and made by such physician as may be procured to attend herein by the defendant, and the said physician is thereby authorized and empowered to make such inspection and examination."

*B. Patterson*, for applt.

*Lauterbach & Spingarn*, for resp't.

*Held*, That no authority for such examination appears in the Code, and if it exists it must be found in the inherent power of the Court.

In actions for dissolution of marriage on the ground of impotence, it has long been the practice of the Court of Chancery to compel the parties when necessary to submit their person to an inspection by physicians to be named by the Court, but such an inspection was allowed on the ground of necessity only. 3 Phill., 325; 5 Paige, 566. The power, however, resting in necessity ends where the necessity ends, and it has been held that where the party has been examined by physicians, no further inspection will be ordered. The testimony of the physicians will be taken. 1 Hag., Ec. R., 523; 52 How, 334; 37 Ohio St., 104; 44 Am. Rep., 659, disapproved.

21 Hun, 268, distinguished.

The exact question here was before the General Term of the Supreme Court in *Roberts v. Ogdensburg RR. Co.*, 29 Hun, 155, and it was there held that the Court had not the power to compel such an examination as is here asked, and with the reasonings and conclusions of the Court in that case we concur.

Order modified accordingly, with \$10 costs, and disbursements to appellant to abide event.

Opinion by *Ingraham, J.*; *Sedgwick, Ch. J.*, concurs.

## TAXES. AWARD. DEED.

N. Y. SUPERIOR COURT. GENERAL TERM.

Mary A. King, *plff.*, v. The Trustees of St. Patrick's Cathedral, *impld.*, etc., *deft.*

Decided June 16, 1884.

Where the grantor in 1871 conveyed certain premises by full covenant warranty deed, in which they were described as bounded by the site of Bloomingdale road, which had been before and then was legally closed as a public highway, said deed also conveying all the right, title and interest, if any, of the grantor, in so much of the road as was adjacent to the premises, and in 1880 an award of damages for closing said road is made. Said award is the property of the grantor and does not pass under the deed.

Submission of controversy under § 1279, Code Civ. Pro.

On April 25, 1871, E. King and W. H. King were the owners of certain land on the Bloomingdale road, between 96th and 97th streets, in the city of New York. On that day this property was conveyed by them by deed, containing the usual covenants, to R. Brennan. Bloomingdale road was closed in March, 1868, under Chap. 697 of Laws of 1867; and at the time of the closing, such property was owned by said E. King and W. H. King. The award for the damage caused by closing the road was made in December, 1880, and the amount for damage to said lots \$7,865. Plaintiff has succeeded to rights of E. and W. H. King, and defendants have succeeded to the rights of R. Brennan. The lots in the deed to Brennan were bounded in front by the easterly



side of the Bloomingdale road. The deed also conveyed all the right, title and interest, "if any, in and to so much of the land laid down on said map as Tenth avenue and 96th and 97th streets, and Bloomingdale road, as is adjacent to the land and premises" so conveyed.

The question involved was as to the ownership of said award.

*J. A. Deering*, for plffs.

*C. E. Miller*, for defts.

*Held*, That plaintiff was entitled to the award. At the time of the conveyance by Brennan, Bloomingdale road was closed as a public highway by authority of law. He is presumed to have received his deed with knowledge of this fact, and to have paid for the property conveyed to him its value with the road closed. There is no covenant expressed in the deeds to him—and one cannot be implied—that would give him an easement and right of way over said road, and it cannot be said that the mere mention of the road in describing the property conveyed, was a statement of its actual existence as a road, upon which the grantors are liable for damages.

The injury was done at the time Bloomingdale road was declared closed, and then became a personal right to damages. This right belonged to the then owner of the fee, and not to the owner when the award was made. The use of the words "tenements, hereditament and appurtenances," in the conveyances to Brennan did not pass

to him the right to these damages. 43 Super. Ct., 426.

Judgment for \$7,865, with interest from April 8, 1881 as stipulated.

Opinion by *Truax, J.*; *Sedgwick, Ch. J.*, and *O'Gorman, J.*, concur.

### TAX SALE. CLOUD ON TITLE.

N. Y. SUPERIOR COURT. GENERAL TERM.

Mary M. Townshend, *respt.*, v. Elihu Williams, *applt.*

Decided June 16, 1884.

Where the advertisement of a tax sale, under Laws 1871, ch. 381, gives notice of the sale of various premises described in a certain list, upon different days named in the advertisement, and requiring redemption to be made on other days therein named, without specifying what lots are to be redeemed each day, a lease given thereunder is void.

But it will be held that such lease has enough presumptive validity to constitute a cloud on title; this though the comptroller has not duly given the certificate provided for in § 16 of said act.

Appeal by defendant from judgment entered upon findings of a judge at Special Term.

Action to have a certain lease given by the City of New York upon sale of premises for taxes, declared to be a cloud upon plaintiff's title thereto; and removed, upon the ground that though such lease was valid on its face and under Laws 1871, chap. 381, § 4, was presumptive evidence of the regularity of the proceeding under which it was given, yet that it was in fact void, proper notice of sale

and redemption not having been given prior to the execution thereof. The advertisement of notice to redeem gave notice of sales of different premises described in a certain list on the 15th, 16th, 18th, 21st, 22d, 23d days of December, 1871, and required redemption to be made on 14th, 15th, 16th, 18th, 21st, 22d and 23d days of December, 1873, without designating which lots were to be redeemed each day.

One objection urged upon this appeal is, that the lease and the proceedings to it are invalid upon their face, and therefore the lease is not a cloud upon the title.

Respondent urged that the lease itself was presumptive evidence of the proceeding.

*Anderson Price*, for applt.

*John Townshend*, for respt.

*Held*, That appellant's objection was untenable. The lease has such apparent and presumptive validity that the plaintiff is entitled to its removal, but in fact the pleadings place the sole defense of the defendant upon the validity of the lease.

Section 16, chap. 381, Laws of 1871, declares that if the comptroller be satisfied by a prescribed kind of affidavit, that notice for redemption had been duly served, and the money for redemption shall not have been paid, "he shall under his hand and seal certify to the fact, and the conveyance shall thereupon become absolute, and the owner and all others interested in the lands and tenements shall be barred of all right

thereto during the term" of the lease. In the present case the comptroller signed the certificate, but he did not seal it. It is argued that therefore the lease was not a cloud because it was not absolute.

*Held*, That the section does not avoid the lease, but it is valid excepting there remains a right of redemption. The statement shows that apparently there is a valid lease, but that the owner of the fee, that is the plaintiff, has a right to redeem. She has a right to have removed the appearance of this right to redeem, as well as the lease, for that is derogatory to her title. The immediate right is, to have removed this apparently valid, but really invalid lease.

Judgment affirmed, with costs.

Opinion by *Sedgwick, Ch. J.*; *Ingraham J.*, concurs.

## EXECUTION AGAINST PERSON.

N. Y. SUPERIOR COURT. GENERAL TERM.

*Emma De F. Sherwood, applt.,*  
*v. Augustus L. Pierce, respt.*

Decided June 16, 1884.

Where the complaint alleges a breach of a contract, and as a conclusion thereto, the conversion of the property forming the subject of the contract, and judgment is taken in default of appearance, the findings following the complaint, no execution against the person can issue, an order of arrest not having been obtained.

Or it may be held that the allegation as to conversion is mere surplusage, and the action is to be deemed one not authorizing a judgment upon which an execution against the person can issue.

Appeal by plaintiff from order setting aside execution against the person issued upon a judgment taken on default of appearance.

The complaint averred, and the finding of the judge followed such averments, that the "plaintiff delivered said stock to the defendant with directions either to collect the amount of said loan at once, or sell said stock and pay over the proceeds to the plaintiff, and defendant received said stock pursuant to said directions, and promised to comply therewith but utterly failed, refused and neglected so to do, but converted said stock and the proceeds thereof to his own use."

*Erastus New*, for applt.

*Henry D. Sedgwick*, for respt.

*Held*, That it is manifest that the complaint states two causes of action. One of these is upon the breach of promise and does not present a cause of arrest. The other is for conversion, in which it is claimed there may be an arrest. The recovery is upon the promise as much as upon the tort, and in such a case a defendant cannot be arrested.

Or another view may be taken, that the allegation of conversion is substantially surplusage, after a sufficient cause of action on contract has been stated, or is deemed to be an allegation of such conversion, as being equivalent to the breach of contract alleged, which would be an error of law. 61 N. Y., 583; 40 id., 124.

Order affirmed, without costs.

Opinion by *Sedgwick, Ch. J.*; *Ingraham, J.*, concurs.

## ARREST. REPLEVIN.

N. Y. SUPERIOR COURT. GENERAL TERM.

Gustav Lippman et al., *respls.*,  
v. Samuel Shapiro, *applt.*

Decided June 16, 1884.

An intent to put property beyond the reach of its owner by any act, the other elements appearing, will justify an order of arrest under § 550, sub. 1, Code Civ. Proc., though the fraudulent actor may not contemplate an action at law to recover the specific property.

In such a case, a fraudulent purchaser is affected by his knowledge that the circumstances justify a reclamation against him.

Appeal by defendant from order denying motion to set aside order of arrest.

The motion was denied below, on the ground that the proof showed that the defendant had disposed of the goods, which the sheriff could not find, with intent to deprive the plaintiff of the benefit thereof. The action was for the recovery of personal property, and the order of arrest was granted under subd. 1, § 550 of the Code of Civil Procedure.

There were enough facts to show that the plaintiffs had been induced by the false representations of the defendant to sell him the goods, and that the sheriff was unable to find these goods. It also appeared that soon after obtaining the goods, defendants made an assignment for the benefit of creditors.

*Blumenstiel & Hirsch*, for applt.

*L. Levy and C. P. Hoffman*, for respts.

*Held*, That the order must be

affirmed. An intent to put the property beyond the reach of its owner, by any act, will, the other elements appearing in the case, authorize the order, although the fraudulent actor may not contemplate an action at law to recover the specific property. A fraudulent purchaser is affected by his knowledge, that the circumstances justify a reclamation of the chattels from him. 70 N. Y., 492. The defendant knew that the chattels had been fraudulently obtained by him and that he should either pay for them or return them. Instead of that, he disposed of them before the assignment, or concealed them from the assignee, which would be really a concealment from all persons, among them these plaintiffs, or he delivered possession of them to the assignee. Any of these things would be in furtherance of the original fraud, and would tend to deprive the plaintiffs of the benefit of them. The inference would be, that such was the intention of the defendant. Because, however, the assignee not being a *bona fide* purchaser, cannot withhold the goods from the plaintiffs, it is argued that if the goods are in possession of the assignee, the assignment cannot be deemed to show that the defendant had an intent, by it, to deprive the owner of the benefit of the goods. The inference is to the contrary, unless it should appear, and it does not, that the defendant made the assignment in such manner that the assignee would not claim the goods and not believe it to be the duty of his trust

Vol. 19—No. 22.

to oppose the plaintiffs' reclamation.

Order affirmed, with \$10 costs.

Opinion by *Sedgwick, Ch. J.*; *Ingraham, J.*, concurs.

## PLEADING. DENIALS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Ferdinand Spies, *applt.*, v. Edward Roberts, *respt.*

Though the following: "Defendant denies each and every allegation therein (in the complaint) contained, except as hereinafter admitted," be not technically correct under § 500 Code, yet if such part of the answer be indefinite and uncertain, the proper remedy would seem to be, not the exclusion of evidence on the trial, but a motion under § 546.

Under such a denial, evidence of failure of consideration for the note sued on, is admissible in an action by an assignee after maturity.

The trial Judge has the power to disregard such defects in the answer.

Appeal from judgment in favor of defendant, and from order denying motion for new trial.

Action for balance due on promissory note given in part payment for a certain engine. The note was assigned to plaintiff after maturity.

The answer to the complaint contained the following: "Defendant denies each and every allegation therein contained, except as hereinafter admitted," and then proceeds to allege an accord and satisfaction.

On the trial defendant was allowed to prove under the above denial, a failure of consideration for said note, viz., in the de-

fective condition of said engine, to which plaintiff excepted.

*D. F. Rank*, and *J. C. De La Mare*, for applt.

*C. E. Patterson*, for respt.

*Held*, That though *Miller v. McCloskey* (1 Civ. Proc., Rept. 252) seems to favor the view that the denial in the answer is neither a general nor specific denial under § 500 Code, but is wholly inoperative for any purpose, and does not controvert any allegation of the complaint, and though this view may be technically correct; yet if this part of the defendant's answer be indefinite or uncertain, the more proper remedy for the plaintiff would be a motion, under section 546 of the Code, and not the exclusion of the evidence at the trial. 47 N. Y., 437.

The evidence went to show that the engine, in part payment for which the note was given, was worthless, and that as between defendant and his vendor, there was never any consideration for the note. The plaintiff as assignee of a note past maturity took only such rights as his assignor had against the defendant. The evidence objected to was admissible under the denial in the answer. 38 N. Y., 263. But even, if in these respects, defects had existed in the answer, the trial Judge had the power to disregard them, as not affecting the substantial rights of the parties. Code, §§ 519, 539, 540, 723.

Judgment affirmed with costs; order affirmed with \$10 costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, concurs.

## NEGLIGENCE. TENEMENT HOUSES. EXECUTORS.

N. Y. SUPERIOR COURT. GENERAL TERM.

*Johanna Donahue, respt., v. Susan R. Kendall, et al., applts.*

Decided June 16, 1884.

Executors, who as such, are in possession and control of premises used as a tenement house, are bound to see that the stairways, etc., intended for common use, are kept in good repair, and they are personally liable to tenants and strangers lawfully using premises, for neglect of that obligation, though under the will they have no right to make repairs at the expense of the estate.

Appeal by defendants from judgment, and from order denying motion for a new trial on the minutes.

Action against landlords of tenement house for injuries.

The plaintiff was a tenant of some rooms in the upper part of the house, with the right to use a part of the cellar. Access to this cellar was to be had by a stairway leading down to the cellar. The plaintiff was going down the stairs, when she fell and was damaged, because one of the steps was gone.

The title of the action contains after defendants' names, the word "executors, etc." The complaint states that as executors they undertook the management and control of the premises where the accident happened, and also states that they, personally, without attending to their executorship, negligently did leave the stairway in a ruined condition, etc.

The answer admitted the pos-

session and control of the premises by defendants. It was urged that the complaint should have been dismissed on the ground that it appeared that plaintiff, as tenant, assumed the risk of defects; and that in any event, judgment should not have gone against defendants individually.

*W. McDermott*, for appls.

*Peter Mitchell*, for respt.

*Held*, That as plaintiff had but a right of passage over the stairway, as had the members of the other nine families in the building, it is not to be presumed that the arrangement intended that she or the others should keep the stairway in repair. The implication from the circumstances, is that it should be kept safe for them.

*Further held*, That whether plaintiff was tenant of defendants or of their testator, they owed a duty to the plaintiff, who was rightfully using the stairway, which as part of the house was in their possession and control, not to allow it to become dangerous. It is supposed that as executors they may have had no power to repair. It is conceivable that they had no such power at the expense of the estate. The presumption is otherwise. They had such a power at their own expense. They were not compelled to go into control of the property, but if they do, they must fulfill duties and responsibilities that are grounded upon the fact of the power of management.

As to the plaintiff, whatever

was the title or right of the defendants, they had an obligation to her, because as natural persons they were in control of the premises and managed them, and were liable for any negligence on their part.

Judgment affirmed and order affirmed with costs.

Opinion by *Sedgwick, Ch. J.*; *Truax, J.*, concurred on the ground that the statute (Laws, 1867, Chap. 908, § 4; Laws 1882, Chap. 410, § 652), placed upon defendants the duty of keeping the stairs in good repair, which duty they failed to perform.

## MUNICIPAL CORPORATIONS. SIDEWALKS.

### N. Y. SUPERIOR COURT. GENERAL TERM.

*Emma Heintze, applt., v. The Mayor, &c., of N. Y., respts.*

The city cannot be held liable for failure to remove snow and ice from a sidewalk, without actual or constructive notice of its condition; this notwithstanding the ordinance requiring owners to remove snow and ice within four hours, under penalty, etc., and though the city be the owner of the premises in question.

Appeal from judgment dismissing complaint with costs.

Action for the recovery of damages for an injury received by falling on ice which had accumulated on the sidewalk in front of a public school-house of which defendants were the owners. The accident occurred between two and three o'clock in the afternoon. The plaintiff's counsel, in his open-

ing, said he was not able to prove the precise hour when the snow had ceased to fall; but that at all events there was glare ice in front of the building. He also said: "This action against the city is based on the neglect of its corporate duties, of keeping the sidewalk clear, and the element that the city is the owner of the property, is invoked for the purpose of strengthening the position that the general duty of the city is to keep all the sidewalks clear. On the question of notice, we shall rely solely and exclusively on the fact that the legal title is in the city." The plaintiff's counsel put in evidence §§ 317, 318, Revised Ordinances City of New York, requiring owners or occupants of dwellings to remove snow or rain which shall freeze on the sidewalk, within four hours after it shall have fallen, under a penalty of three dollars for every such neglect, and also in case the ice or snow shall be congealed, etc., to throw ashes or sand on it, under penalty of one dollar.

The trial judge dismissed the plaintiff's complaint on the opening.

*Wehle & Jordan*, for applts.

*George P. Andrews*, Counsel to the Corporation, for resp't.

*Held*, No error. The mere ownership of the property does not subject the owner to liability for failure to remove ice from the adjacent sidewalk. 87 N. Y., 84. The building being a school-house, the custody and control of it was in the hands of the trustees of the

ward. Laws 1853, chap. 101, § 10; Laws 1864, chap. 351, § 19. The accident was the result of natural causes, not permanent in their nature, and which defendants had no part in creating, and negligence is not imputable to the owner. 59 N. Y., 36. The legal ownership by the defendants of a school house used exclusively for school purposes, and under the exclusive control of the Board of Education, does not create any liability in defendants for any injury occurring by reason of the negligence of said board or its servants in the use or care of the premises. 70 N. Y., 459; 62 Id., 167.

The violation of a corporation ordinance gives no right of action which did not exist before. 8 Daly, 318. Moreover, a municipal corporation cannot be held liable in tort for failure to obey its own ordinances. 3 Peters U. S. 409. Apart from the claim of liability in defendants, made by the plaintiff's counsel, by reason of ownership of the premises, there is not any evidence that would warrant a finding of constructive notice of any kind in defendants, of the dangerous condition of the sidewalk. 18 Hun, 167; 18 Id., 144. Without proof of such notice, express or constructive, negligence cannot be imputed to the defendants. 61 N. Y., 506.

Judgment affirmed, with costs.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch. J.*, concurs.

## UNDERTAKING. REPLEVIN.

N. Y. SUPERIOR COURT. GENERAL TERM.

Henry J. Goodwin et al., *respts.*,  
v. Julius Bunzl et al., *appls.*

Decided June 26, 1884.

An undertaking on appeal, though defective in form, and not sufficient to give a stay of proceedings, may as against the sureties, be supported, as any other contract, by sufficient consideration, which may be proved by circumstantial evidence, and the burden of proving which is on the party seeking to charge the sureties.

Where an undertaking, defective in that respect, is made for the purpose of obtaining a stay, and respondent at appellant's request withdraws his exception thereto, and the undertaking is approved on consent, and used to obtain a stay, and respondent relying solely on it does not issue execution, the sureties will be held liable thereon, especially when it does not appear that they knew of or took action on the exception to the undertaking.

In this case, where the judgment in replevin against three defendants, was affirmed as to two defendants, it was *Held*, That there was a breach of the condition of the undertaking.

Appeal from judgment in favor of plaintiffs.

Action on an undertaking given on appeal from judgment in an action of replevin. The defence was, among other things, that the undertaking was not supported by any legal consideration, it not being in the statutory form necessary to give a stay of proceedings.

Both sides moved for direction of a verdict.

*M. H. Regensberger* and *E. P. Wheeler*, for *appls.*

*Kelly & McRae*, for *respts.*

*Held*, That the undertaking may be supported, as any contract may

be, by a sufficient consideration, which, when the undertaking is not in due form, it is necessary that the plaintiff in an action upon it must affirmatively prove. In such a case the consideration may, as in any other case, be an inconvenience suffered, or a forbearance of a right to enforce a legal remedy, by a promisee at the request of the promisor. It may be shown by circumstantial testimony. A stay of proceedings upon a judgment on request is a sufficient consideration. 60 N. Y., 376. The sureties were presumed to know the law. The only purpose for which they could have made and offered the undertaking, was to secure to their principal the benefit of a stay. The want of form to comply with the statute was, it is to be presumed, within their knowledge. The respondents having the power to object to the undertaking and to secure its disapproval, consented that it might be approved as it was; and their attorney did not issue any execution, relying on the undertaking. All these facts and the necessary implications from them tend to show a stay at the request of the defendants. The undertaking was used as the defendants (it is to be inferred) intended it was to be used, in being presented to the judge who approved it, for his determination as to whether it was in proper form and with sufficient sureties to give the appellants in that case a right to a stay. The approval was a judicial determination by him on the subject, and all the parties to



it should be bound by it, until it be set aside. The fact that the sureties made the undertaking and delivered it, is sufficient evidence that the approval was by their consent, or rather at their instance. At the request of the attorney for the appellant in the former action, the attorney for the respondents withdrew his exception and consented to the approval of the undertaking. Therefore, the case stands as if there had been no exception, especially when the sureties were not apprised of the exception and did not in any way act upon it.

There was an objection that the condition of the undertaking was not broken. The condition was, "if the said judgment so appealed from or any part thereof be affirmed, or the appeal be dismissed, the said appellants will pay the sum recovered or directed to be paid by the said judgment." The judgment was that "the plaintiff recover from the defendants the possession of said property, together with said \$49 damages and said costs, or if possession of said property is not delivered to plaintiff, then that they recover the said value, together with said damages and costs, making in all the sum of \$1,675.87," etc. The action was in replevin against three defendants. Two of them were parties who had assigned and transferred the chattels to the third, and the chattels were, at the time of the action, in the possession of the third, and remained there until he transferred them to other persons. The judgment was affirmed as to

the assignor, and reversed as to the assignee. A new trial was had, and judgment rendered in his favor.

*Held*, That the judgment was really joint and several against the three, and when there was an affirmance as to the assignors the sureties became liable upon the undertaking. 3 Keys, 636. It does not follow that because, in fact, the possession of the chattels was in the third defendant, the obligation of the two, under the judgment to restore them to the plaintiffs, was affected. Replevin will lie although the defendant has parted with the possession of the property and the same is beyond the reach of the process of the court, so that in no event can a return of the property be had, either in virtue of the claim and demand of the plaintiff or any judgment that may be given in the action. 70 N. Y., 492; 23 N. Y., 264.

Judgment affirmed, with costs.

Opinion by *Sedgwick, Ch. J.*; *Truax, J.*, concurs.

#### DENIALS. AMENDMENTS.

#### N. Y. SUPERIOR COURT. GENERAL TERM.

John G. Hoffman, *applt.*, v. The N. Y., Lake Erie & Western R.R. Co., *respt.*

Decided June 16, 1884.

Though a denial of each and every allegation of the complaint, except as admitted, qualified or explained, makes no issue, and though a ruling on the trial denying a motion for judgment thereon must be tested as the answer then stood, no amendment

having been asked for, yet if plaintiff fails thereafter to make a case, the General Term, on appeal, should, in the interests of justice, allow an amendment of the answer.

Action for damages for being ejected from cars of defendant.

The answer "denies each and every allegation set forth in the complaint, except as herein admitted, qualified or explained;" admitted the first allegation of the complaint, viz., as to incorporation of defendant, etc.; and then sets forth facts showing that at the time mentioned in the complaint, a certain person, but whether plaintiff or not, the defendant was ignorant, was on defendant's train and was properly expelled for due cause.

Plaintiff moved for judgment on the pleadings, which was denied, and after his evidence was in, the complaint was dismissed.

*E. S. Hatch*, for applt.

*Abbett & Fuller*, for resp't.

*Held*, That plaintiff's motion should have been granted. The answer did not contain the general or specific denial of the allegations of the complaint required by section 500 of the Code of Civil Procedure. The motion was made in due season, and the ruling must be tested by the answer as it then was, and not by the answer as it would have been if it had been changed by an amendment that was not asked for or made. 76 N. Y., 397.

But as plaintiff failed to prove a cause of action, and as the court at trial term could have amended the answer so that it would have contained what the pleader in-

tended it to contain—a general denial—in the interests of justice, the defendant should be allowed to amend its answer, *nunc pro tunc*, by striking out the words "qualified or explained" in the first paragraph, on defendant stipulating to satisfy the judgment heretofore entered against the plaintiff. If defendant does not give the stipulation, judgment will be reversed, with costs to appellant to abide event.

Opinion by *Truax, J.*; *Ingraham, J.*, concurs.

### ABANDONMENT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People ex rel. Clara Scherer v. Andrew Walsh, Police Justice.

Decided Sept., 1884.

Certiorari is the proper mode of review of the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under § 899 of the Code of Criminal Procedure.

Such a proceeding is not a criminal action as defined in that Code, and the Justice before whom it is brought sits as a magistrate and not as a Court of Special Sessions. No appeal is given in such proceedings.

On the hearing, the fact that the wife left the husband's domicile is not decisive of the question of abandonment, but the wife may show that she had reasonable cause to leave, and if it appears that it was unsafe for her to remain in the house with him, because she was in imminent danger of suffering personal violence at his hands, her case is made out, and it is therefore error on the part of the magistrate to exclude such testimony.

The relator made complaint against her husband, Conrad Scherer, before Andrew Walsh, a Po-

lice Justice of Brooklyn, under § 899, subd. 1, of the Code of Criminal Procedure, charging him with being a disorderly person in having abandoned his wife. On the hearing, it appeared in evidence that the relator had left her husband's house. She offered evidence to show that her husband had beaten her and threatened her life, and that she left him because of his abuse and threats and because she was in danger of personal violence. This evidence was objected to by the husband's counsel on the ground that if a woman leaves her husband's house, abandonment is at an end and her reasons for leaving are irrelevant. The Justice sustained the objection and dismissed the complaint.

The relator obtained a writ of certiorari to review this decision. At General Term it was strenuously contended by counsel for defendant that the decision could only be reviewed by appeal.

*A. H. Dailey and J. D. Bell*, for relator.

*Fisher & Voltz and Jesse Johnson*, for deft.

*Held*, This is a proceeding by certiorari to review in this Court the decision and rulings of a Police Justice. The decision and rulings brought to be reviewed were given upon a trial before the Justice upon a complaint made against Conrad Scherer by his wife, the relator herein, for abandonment. The Justice refused to admit certain testimony offered on behalf of this relator and dismissed the complaint. The charge was made under § 899 of Code of Criminal

Procedure, subd. 1, and the first question to be disposed of is whether the action of the magistrate can be reviewed by certiorari.

• By § 515 of Code of Criminal Procedure, writs of certiorari in criminal actions as they have heretofore existed are abolished, and a review had by an appeal; but this section refers only to criminal actions as defined in that Code. The proceeding before the magistrate was not strictly a criminal action, but was a special proceeding of a criminal nature, under part 6 of the Criminal Code, title 7. No right of appeal seems to be provided for under this part of the Criminal Code, except under title 5—"Of proceedings respecting bastards."

And hence, § 515 abolishing writs of certiorari, does not apply to part 6, but the law remains as it existed before the Criminal Code.

Section 515 in plain terms refers only to a judgment or order in a criminal action, and not to a special proceeding of a criminal nature. This distinction is rendered more apparent by referring to title 2, part 6, of the Criminal Code, §§ 950-951 and 952. It is clear, therefore, that no right of appeal was given by the Code to either party in this proceeding. It cannot be claimed that an appeal was authorized by § 749, which provides for appeals from judgments rendered by a Court of Special Sessions.

It is true the defendant entitled the proceedings as in Special Ses-

sions, but that did not affect the rights of the parties.

The proceedings were not in a Court of Special Sessions, but were before the defendant as Police Justice.

There is a marked distinction between Courts of Special Sessions and Courts held by Police Justices under special provisions of law both in the Constitution and the Code of Criminal Procedure. *People v. Trumble*, 1 Crim. Rep., 443. It was also held in *People v. Burleigh*, Id., 522, 523, that where authority is conferred upon a particular officer or magistrate, giving to him special jurisdiction in a criminal matter with special directions as to the mode of procedure, he must be deemed to act as an officer and not as a Court of Special Sessions.

This principle is decisive in this case.

Section 399 gave special jurisdiction to a Police Justice with special directions as to the mode of procedure, and the Justice must be deemed to have acted as an officer and not as a Court of Special Sessions.

The writ of certiorari is therefore a proper remedy under which to review the proceedings.

We also think the defendant erred in excluding testimony showing it was unsafe for the wife to remain in the house with the accused. There is no rule of law requiring a wife to remain under the roof of a brute, in constant danger of life and limb, under pain of starvation. It was, therefore, competent for the relator to

show that she had reasonable cause to leave the house where she was in imminent danger of suffering personal violence at the hands of her husband.

If this testimony had been received, the offence of which the accused was charged would have been clearly made out under the statute.

This statute has been under the consideration of this Court since its amendment and its provisions fully discussed. *People v. Naehner*, 1 Crim. Rep., 513.

Decision vacated and set aside, without costs.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs.

## CONSTITUTIONAL LAW.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William McDonald, *applt.*, v. The Mayor, etc., *respt.*

Decided October 8, 1884.

Chap. 418, Laws of 1876, entitled "An Act in relation to the clerks, officers, and attendants of the Marine Court of the City of New York," is not a local or private bill, but relates to a part of the judicial system of the State, which makes the officers named in the bill State officials.

Appeal from an order and a judgment of the Special Term overruling demurrer to the answer of the defendants.

The plaintiff, in 1874, was appointed assistant clerk of the Marine Court, and his salary fixed pursuant to Chap. 453 of the Laws of 1873, at the sum of \$2,500 per annum, at which rate he was

paid until June 1st, 1876. From that time he was paid at the rate of \$2,000 per annum in pursuance of the provisions of Chap. 413, Laws of 1876, which reduced the salary to the sum mentioned.

This case was brought to recover the difference between \$2,500 and \$2,000, for services rendered since the first of June, 1876. The defendants pleaded in answer the act of 1876 already mentioned, and the plaintiff demurred to the defence thus interposed, upon the ground, among others, that the act was unconstitutional, because it was a local and private bill, and assumed to create or decrease the fees or allowances of the officers therein named during the term for which they were appointed.

*James A. Deering*, for applt.

*David J. Dean*, for respt.

*Held*, That the said act was constitutional, for, although entitled "An Act in relation to the clerks, officers and attendants of the Marine Court of the city of New York," it was not a local or private, but related to a part of the judicial system of the State, which made the officers named in the bill State officials.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurred.

#### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Hannah Cohen et ano.*, as admx. and admr. of *Pischel Cohen*, respts., v. *The Mayor. &c.*, applts.

Decided Oct. 8th, 1884.

When the City grants to a person a license which it has no power to grant, and an injury to a third person results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license or grant, the City is not liable for the damages accruing from such injury without some proof of negligence showing permission to use, or acquiescence in the use of such negligent mode of exercising the license, after notice or knowledge on the part of the City.

Appeal from a judgment entered on a verdict and from an order denying motion for new trial on the minutes of the court.

The City granted a license to the defendant Marks to store a wagon in front of his premises, in Attorney street, in the City of New York. Under that license Marks was accustomed to keep his wagon in the street next the curb, and to turn up its thills and fasten them with a string. The defendant Muller was driving his ice wagon rapidly through said street, and in so doing struck the outer hind wheel of Marks' wagon, throwing it around so that its front was toward the sidewalk, and breaking the string which held up the thills. The plaintiffs' intestate was at that moment passing on the sidewalk, and as the thills fell from the breaking of the string they struck him with such force upon his head as to cause his death. The plaintiffs, as his representatives, brought this action against the City and Marks and Muller, as jointly liable for the death of their intestate. Upon these facts the Court directed the jury to assess the damages for the plaintiffs against all the de-

endants, and submitted no other questions to them.

*D. J. Dean*, for appls.

*N. A. Chedsey*, for respts.

*Held*, Error; That even if it be conceded, as it probably must be, that the City had no legal right to grant the license to store or keep the wagon in the street, still its liability for the particular injury which caused the death of plaintiffs' intestate cannot be sustained upon proof of the mere fact of the granting of such license. That fact was not the immediate cause of the injury which resulted from the negligent driving of the defendant Muller and the insufficient manner in which the defendant Marks had tied up the thills of his wagon. To make the City responsible for the injury, some evidence tending to show knowledge on its part, or notice in some form, of the insecure and careless way in which the wagon was stored in the street should have been shown.

That the true rule in such cases is, that where the injury clearly results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license or grant, there must be some proof of negligence showing permission to use, or acquiescence in the use of the mode, after notice or knowledge on the part of the licensor. 47 N. Y., 639; 74 N. Y., 273.

Judgment, so far as it relates to the City, and order denying the new trial, reversed, and a new trial granted.

Opinion by *Davis*, P. J.; *Dan-*

*iels*, J., concurred, *Brady*, J., dissented.

## PLEADING. DEMURRER.

N. Y SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Saffold Berney et al.*, respts., v. *Anthony J. Drexel et al.*, appls.

Decided Oct. 8, 1884.

In order to take advantage by demurrer of the misjoinder of parties plaintiff, it is necessary that the defendant should not only assign as a ground of demurrer "that there is a misjoinder of parties plaintiff," but should proceed to point out the particular plaintiffs who are misjoined, and state the reason constituting such joinder an improper one. The point that there is a misjoinder of parties plaintiff cannot be taken under a demurrer assigning as a cause "that the complaint does not state facts constituting a cause of action," upon the ground that the complaint shows affirmatively that the cause and right of action are not vested in all the parties plaintiff.

Motion for reargument of appeal from judgment overruling demurrer to complaint.

The demurrer in this case assigned the following grounds:

1st. That the plaintiff had no legal capacity to sue.

2d. That there was a defect of parties defendant.

3d. That the complaint did not state facts sufficient to constitute a cause of action.

It appears upon the face of the complaint that there was a misjoinder of parties plaintiff inasmuch as it appeared that the plaintiff, Louise Berney, had no cause of action jointly with the other plaintiffs, but that the sole cause of action set forth in the

complaint was averred to be on the other plaintiffs exclusive of her; and it was argued that such misjoinder could be taken advantage of under the third cause assigned in the demurrer, namely, "that the complaint did not state facts sufficient to constitute a cause of action," for the reason that the complaint affirmatively showed that the cause and right of action were not vested in all the parties plaintiff.

*Tracy, Olmstead & Tracy*, for appls.

*Lord, Day & Lord*, for respts.

*Held*, That § 488 of the Code of Civ. Pro. specifies a misjoinder of parties plaintiff as one of the grounds upon which a defendant may demur to a complaint; and that § 490 provides that when a party demurs upon that ground he must point out specifically the particular defect relied upon; and that in order, therefore, to take advantage by demurrer of the misjoinder of Mrs. Berney as a plaintiff, it was necessary that the defendants should not only have assigned as a ground of demurrer "that there was a misjoinder of parties plaintiff," but should have proceeded to point out that the plaintiff, Louise Berney, was improperly joined with the other plaintiffs because she was shown to have no cause of action jointly with them, but that the sole cause of action set forth in the complaint was averred to be in the other plaintiffs exclusive of her.

That the contention that the misjoinder of Mrs. Berney as a plaintiff could be taken advantage

of under the 3d cause of demurrer assigned, viz., that the complaint does not state facts sufficient to constitute a cause of action, would be entitled to greater force if it were not for the fact that the Code makes such misjoinder a special cause of demurrer; and, moreover, a demurrer upon the ground that the complaint fails to state facts constituting a cause of action is aimed only at a failure to state any cause of action in the complaint, and where several plaintiffs unite in bringing an action and state in their complaint facts which do constitute a cause of action in favor of one or more but not of all the plaintiffs, a demurrer stating for its cause a failure to set forth a cause of action must be overruled, because the defect is not that the complaint does not state facts sufficient to constitute a cause of action, but that it fails to show that the cause of action stated belongs to all the plaintiffs, which is quite another thing and is a separate ground for demurrer.

Motion denied.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concurred.

#### TAXATION. ASSESSMENT ROLL.

The People ex rel. Chamberlain, *respt.*, v. Forrest et al., *appls.*

N. Y. COURT OF APPEALS.

Decided Oct. 7, 1884.

The assessors by mistake entered the valuation on plaintiff's personal property at \$4,000 instead of \$40,000. The mistake was discovered shortly after, but no correction

was made until after the book was open for inspection. On grievance day relator was notified of the change and requested that the assessment be fixed at the original amount, which was refused. *Held*, Error; that the change made was not merely the correction of a clerical error, but one that concerned the substance and extent of the assessment.

Affirming S. C., 17 W. Dig., 377.

This is a proceeding by *certiorari* to have an assessment reduced.

The relator, as trustee, was intended to be assessed upon personal property in his hands to the amount of \$40,000. The assessors agreed upon that amount as the corrected valuation, but they, or some one for them, entered it on the roll at \$4,000. Before notice of the completion of the roll, while change or correction was within their power, they discovered the fact of the mistaken entry. With this knowledge, they failed to make the change, and allowed the error to stand until they certified that the roll was complete and open for inspection. Notice to that effect was given July 26, 1882, and no change in the entry was made until after August 2, 1882. After that and before the review day, one of the assessors changed the \$4,000 to \$40,000. So far as appears this change was made without notice to the relator or his associates, although they afterwards approved and ratified his act. When review day arrived the relator was notified of the change.

*J. A. Van Derlip*, for appls.

*W. A. Sutherland*, for resp't.

*Held*, That the relator is entitled

to the relief sought; that the change made by the assessors was not merely the correction of a clerical error, but one that concerned the very substance and extent of the assessment, 77 N. Y., 485; the assessors having suffered the error to remain after discovery, it became one of pure negligence, and they should not be allowed to plead it as a sufficient reason for depriving the taxpayers of the full notice the law gives him and which is his right.

Judgment of General Term, affirming judgment reducing assessment, affirmed.

Opinion by *Finch, J.*; all concur.

## NEGLIGENCE.

### N. Y. COURT OF APPEALS.

*Glasing, resp't., v. Sharp, rec'r, applt.*

Decided Oct. 7, 1884.

Plaintiff, who was about to drive across defendant's track in the city of Brooklyn, looked both ways and saw no train, and saw the gate at the crossing raised and the gateman go into his house. He then attempted to cross, without looking again, when his horse was struck by a passing engine and killed. *Held*, That the question of plaintiff's negligence was properly left to the jury; that the raising of the gates was a substantial assurance of safety, and the conduct of the gateman could not be ignored in passing upon plaintiff's conduct.

Affirming S. C., 14 W. Dig., 167.

This action was brought to recover damages for injuries to plaintiff's horse and wagon from being struck by a train on the L. I. R.R., operated by defendant as



receiver. It appeared that there are two tracks of said road laid in Atlantic avenue, Brooklyn; that on the morning of Nov. 8, 1880, plaintiff was approaching said avenue from the south along New York avenue, in a covered one-horse wagon; that he saw a train pass east, and then saw the gateman raise the gates at the crossing and go into the gate-house. Plaintiff drove on, and at the crosswalk of Atlantic avenue carefully looked both ways, and seeing no train, drove on, and his horse was killed and his wagon wrecked by a collision with a train going west. The evidence showed that no bell was rung or whistle blown. It was also proved that at the place where plaintiff stopped and looked, about thirty feet from the railroad track, his view was somewhat obstructed, and that he did not look again while passing over the thirty feet, although the view was unobstructed and he could have seen the train if he had looked.

The question of plaintiff's contributory negligence was submitted to the jury.

*Edward E. Sprague*, for applt.

*Oliver S. Ackley*, for respt.

*Held*, No error; that the raising of the gates was a substantial assurance to plaintiff of safety, and the conduct of the gateman could not be ignored in passing upon plaintiff's conduct.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

Opinion by *Earl, J.* All concur.

## MORTGAGE. SURETSHIP.

N. Y. COURT OF APPEALS.

*Grow, respt., v. Garlock et al., appls.*

Decided Oct. 7, 1884.

One J. G. applied to plaintiff for a loan to take up an overdue note. Plaintiff refused to take his note, but agreed to take a mortgage on the farm of H. G., and thereafter took up the note and delivered it to J. G. in exchange for said mortgage. *Held*, That as between J. G. and H. G. the former was principal debtor and H. G. a surety, and that plaintiff having knowledge of these facts was bound thereby.

Reversing S. C., 15 W. Dig., 259.

This action was brought to foreclose a mortgage executed under the following circumstances: Before the mortgage was executed one J. G. borrowed of a bank for his own use \$2,000 and gave a note therefor made by himself and indorsed for his accommodation by H. G., his father. The note was about falling due and the banker insisted on payment. J. G. being unable to pay it, he and H. G. applied to plaintiff for a loan of money to take up the note, and proposed to give him their joint note. He declined to take the note, but agreed to take a mortgage on H. G.'s farm for the amount of the loan. H. G. then executed the bond and mortgage and delivered them to J. G., who went with plaintiff to the bank, where plaintiff produced the \$2,000 and took up the note and delivered it to J. G., who then delivered the bond and mortgage to plaintiff. Afterwards, in February, 1875, J. G., at the request of plaintiff, guaran-

teed the payment of the bond and mortgage. A judgment for deficiency was asked for against H. G. and J. G. All the defendants except H. G. and one S. suffered default. S. set up in his answer that he conveyed the mortgaged premises to H. G. and had a vendor's lien upon them for unpaid purchase money, which was known to plaintiff at the time he took the mortgage, and which was therefore prior and superior to the lien of said mortgage. He also set up, as did H. G. in his answer, that the mortgage was executed by H. G., with the knowledge of plaintiff, for the accommodation of J. G., who was the principal debtor, and that plaintiff had dealt with J. G. and his property so as to release H. G. from liability upon his bond and mortgage. There was evidence tending to show that plaintiff in his dealings with J. G. and his property disregarded and violated the rights of H. G. as surety. The referee found that plaintiff in taking the mortgage relied upon the records which showed a clear title to the premises in H. G. and that he had no knowledge that any of the purchase money remained unpaid to S. He found as matter of law that as to plaintiff H. G. was the principal debtor, and not a surety for J. G., so that the release of any securities received from J. G. would not affect the liability of H. G. to plaintiff.

*Wayland F. Ford*, for applts.

*Jno. C. McCarten*, for resp't.

*Held*, Error; that as between J. G. and H. G. the debt to plaintiff was really the debt of J. G. for

which H. G. had bound himself as surety, and J. G. was the principal debtor, and plaintiff having knowledge of these facts was bound thereby. 67 N. Y., 95; 73 id., 211; 83 id., 145.

Judgment of General Term, affirming judgment for plaintiff, reversed and new trial granted.

Opinion by *Earl, J.* All concur, except *Danforth, J.*, absent.

## EASEMENT.

### N. Y. COURT OF APPEALS.

*Huntington, resp't., v. Asher, applt.*

Decided Oct. 7, 1884.

One H. granted certain lands to a defendant's grantor together with the exclusive right to take ice from H.'s pond, and the right of access for that purpose to and from the pond, in consideration whereof A. was to furnish H. and his grantees all the ice necessary for their family use. *Held*, That the right to take the ice was an easement attached to the dominant estate and appurtenant thereto and would pass under a deed transferring the land with its appurtenances, and that H. and his grantees had no right to destroy the dam or prevent its necessary repair.

Reversing S. C., 14 W. Dig., 264

This action was brought to injoin defendant from entering upon plaintiff's lands for the purpose of restoring a dam and from taking ice from a pond created thereby. It appeared that in Nov., 1869, one H. owned the lands of plaintiff and defendant, the former consisting of a mill pond and the latter a lot adjoining the mill pond containing about half an acre. He conveyed the half acre lot to one

A. for the purpose of erecting thereon an ice house to store the product of the pond, and as a means of conducting the ice business, and "as incident to the conveyance," granted and conveyed to A., his heirs and assigns, "the exclusive right to take ice from the pond of the party of the first part, with the right and privilege of access for that purpose, to and from the pond to the ice house to be erected on the lot." The grantee in consideration of the grant covenant "for himself, his heirs and assigns" to furnish to the grantor and his successive grantees all the ice necessary for their family use, so long as they should reside in the town. The half acre lot was subsequently conveyed to defendant "together with all, and singular, the hereditaments and appurtenances thereto belonging or in any wise appertaining." After the transfer to A. he built an ice house on the lot and took ice from the pond to fill it. In 1872 one of H.'s grantees destroyed the dam and no ice was taken until 1877, when defendant having first obtained plaintiff's consent, built a temporary dam and cut ice. This dam was removed the following spring.

*Henry M. Taylor*, for applt.

*O. D. M. Baker*, for respt.

*Held*, That the deed contemplated a dominant and servient estate, and the right to take the ice was an easement attached to the dominant estate and appurtenant thereto.

A right to take a profit from another's land, although capable

of being transferred in gross, may also be so attached to a dominant estate as to pass with it by a grant transferring the land with its appurtenances. 22 Wend. 425; Washb. on Eas. 8, § 7; 2 B. & Ald. 724.

*Ackroyd v. Smith*, 10 C. B. 164, *Grubb v. Guilford*, 4 Watts 223, distinguished.

*Also held*, That while the grantor and his successors were not bound to maintain the dam, that fact did not authorize them to destroy it or prevent its necessary repair. The grant of the easement carried with it whatever was essential to its enjoyment, and gave to the owner of the dominant estate the right to repair and rebuild the dam. Washb. on Eas. 39, 565; 55 N. Y. 275.

Judgment of General Term affirming judgment for plaintiff, reversed and new trial granted.

Opinion by *Finch, J.*; all concur.

## LIVERY. LIEN. GIFT.

N. Y. COURT OF APPEALS.

*Armitage, respt., v. Mace, applt.*

Decided Oct. 7, 1884.

Defendant, who kept a boarding stable, agreed with plaintiff's husband to take plaintiff's mare around to race courses, etc., and enter her for races, defendant to have half her winnings and plaintiff's husband to pay all expenses. *Held*, That the defendant did not board the mare within Chap. 498, Laws of 1872, and could not establish a lien for such expenses under that act.

Plaintiff's husband formerly owned the mare, but on her asking him to give it to her, said, "I will give her to you. She shall be

your property." The mare was present at the time, and the husband notified the man in charge and told him he was to deliver the mare to plaintiff when she wanted her. Plaintiff used the mare exclusively thereafter, and it was recognized in the family as her property. *Held*, Sufficient to authorize a finding that the mare was delivered to and possessed by plaintiff in pursuance and consummation of a gift.

This action was brought to recover possession of a mare, to which plaintiff claimed title by gift from her husband. Defendant's answer denied plaintiff's title and alleged that he had a lien upon the mare for her keep and board under Chapter 498 of the Laws of 1872. It appeared that the mare had been owned and used for some time by plaintiff's husband, and was a family pet, plaintiff having often expressed to her husband a wish to own the mare, and having asked him to give the mare to her. On one occasion, when they had just returned from the depot with the mare, and while standing beside her at the stable, plaintiff again asked her husband to give her the mare, and he said, "Very well, you like her so much I will give her to you. She shall be your property," and he called the man that was taking care of her and informed him of the gift, and told him that thereafter the previous orders he had given about the use of the mare were changed, and that he was thereafter to deliver the mare to plaintiff as she wanted her. Plaintiff thanked her husband for the gift. Prior to this plaintiff had never driven the mare alone, having driven another horse, her hus-

band having used the mare. After this she used the mare exclusively and her husband used another horse, and always recognized the mare as plaintiff's property, and she was so recognized in his family. After the gift to plaintiff the mare was left in her husband's stable, plaintiff having no stable or income of her own. About four years after the gift the mare was, with plaintiff's consent, delivered to defendant, who kept a boarding stable, by her husband, to be kept, trained and sold. Defendant supposed that the mare belonged to plaintiff's husband. He kept the mare for about four months at an agreed price, which was paid. An agreement was then made that defendant should take the mare around the country to race courses and driving parks, and enter her for races, and he was to have half her winnings, and plaintiff's husband was to pay all expenses, and it was for these expenses he claims a lien.

*Peter Mitchell*, for applt.

*Edward Kempton*, for respt.

*Held*, That defendant did not, within the act of 1872, board the mare, and could not establish a lien under said act for the charges made.

*Also held*, That the evidence was sufficient to carry the case to the jury, and to authorize a finding by them that the mare was delivered to and possessed by plaintiff in pursuance and consummation of a gift.

A husband may make a valid gift of personal property directly

to his wife. 36 N. Y., 412 ; 48 id., 216 ; 88 id., 299.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

Opinion by *Earl, J.* All concur.

### NEGLIGENCE.

#### N. Y. COURT OF APPEALS.

Hannon, *applt.*, v. Agnew, et al., *respts.*

Decided Oct. 7, 1884.

The Trustees of the Brooklyn Bridge are not responsible for the accident occurring thereon on Decoration Day, 1883, by reason of neglect to appoint an adequate police force. The policemen appointed by the Superintendent alone, or after consultation with some of the Trustees, must be held to be regular police authorized to do duty as such.

This action was brought to recover damages for injuries received by plaintiff in an accident on the Brooklyn Bridge, on May 30, 1883. It is sought to make the trustees liable because of an alleged neglect on their part to "appoint an adequate police force, and to regulate and direct the same for the protection of the bridge and the travel upon it," as required by Section 8 of Chapter 300 of the Laws of 1875. The policemen, of whom there were forty-four, were not appointed by the trustees but by the superintendent. It did not appear but that the police force was just as efficient and useful as if it had been regularly appointed. Its members acted and performed duty as regular policemen. The accident, in which the plaintiff was

injured, occurred six days after the bridge was opened, and before the trustees had had much experience in its management or the exigencies that might arise in its use. No one could have foreseen the accident that occurred. There was no evidence that the police on duty were not perfectly competent to perform the duties that devolved upon them, or that they were not properly directed. There was not satisfactory evidence that the number was inadequate. The complaint was dismissed.

*James M. Lyddy*, for *applt.*

*A. J. Vanderpoel*, for *respts.*

*Held*, No error ; that as against the defendants there was nothing to submit to the jury ; the trustees are not responsible to plaintiff for any omission of duty unless that omission was the proximate cause of her injuries ; that for the purposes of this action the policemen appointed by the superintendent alone or after consultation with some of the trustees, must be held as regular policemen, authorized to do duty as such.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur, except *Danforth, J.*, absent.

### MARRIED WOMEN. ESTOPPEL.

#### N. Y. COURT OF APPEALS.

Knowles, *applt.*, v. Toone, *impl'd, respt.*

Decided Oct. 7, 1884.

Defendant, a married woman, was accommodation indorser on a note which plaintiff purchased in reliance upon answers in writing made by her to questions propounded, in which she stated that if the note was not paid she considered it incumbent to pay the same, and that her private estate was bound therefor. *Held*, That the answers amounted to an agreement, binding on her separate estate, which estopped her from denying that her separate estate was bound. Reversing S. C., 14 W. Dig., 432.

This was an action upon a promissory note. It appeared that the note in suit, indorsed by defendant, a married woman, for accommodation of the maker, was presented to plaintiff for purchase. He declined to purchase it at that time, and propounded certain questions in writing in regard to the same, and as to her liability to pay it, as well as her pecuniary responsibility. In answer to these questions T. stated in writing, among other things, that if the note was not paid she considered it incumbent upon herself to pay the same, and that her private estate was bound therefor. This statement was dated three days after the date of the note. In reliance upon it, plaintiff purchased the note.

*P. Mitchell*, for applt.

*George H. Yeaman*, for respt.

*Held*, That the contract must be determined by the note in connection with the answers to the questions propounded. The note had no inception until plaintiff bought it. 47 N. Y., 324; 76 id., 196; 69 id., 597.

*Also held*, That T.'s answers to the questions propounded by plaintiff amounted to an agreement binding upon her separate estate,

which estops her from denying that her separate estate was bound.

Judgment of General Term, affirming judgment on the report of referee for plaintiff, reversed and new trial granted.

Opinion by *Miller J.*; all concur.

## APPEAL. COMMON PLEAS.

N. Y. COURT OF APPEALS.

Wilmore, *applt.*, v. Flack et al.,  
EXRS., *respts.*

Decided Oct. 7, 1884.

An appeal to the Common Pleas from an order of the General Term of the Marine Court granting a new trial is only allowed on condition that the appellant consents to final judgment against him in case of affirmance. Where no such consent is given the Common Pleas can acquire no jurisdiction and the appellant is not estopped from objecting to the want of jurisdiction by his having appeared and submitted his appeal. A judgment entered in such a case is void and equity will relieve therefrom.

The right of an appellant to withhold his consent cannot be taken away under the guise of correcting a mistake.

Reversing S. C., 16 W. Dig., 236.

This action was brought to set aside a judgment of the Marine Court of the city of New York, on the ground that it was void for want of jurisdiction. It appeared that on Feb. 3, 1875, plaintiff recovered a judgment in said court against one L. and issued execution thereon to one H., then a marshal of the city of New York, who levied upon sufficient property to satisfy the execution. C., defendant's testator, who was then sheriff of the county of New York, took said property from H. and con-

verted it to his own use, plaintiff being about to sue H. for neglecting to satisfy the execution and permitting C. to take the property levied on, was induced by H., having previously given H. a bond of indemnity against the claims of C. to the property, not to sue H., but to permit him to sue C. for plaintiff's benefit for the conversion. Such action was brought in the Marine Court and a judgment rendered therein in favor of H. against C., Dec. 11, 1877, for plaintiff's execution, interest and costs. C. appealed to the General Term where the judgment was reversed and a new trial granted. H. appealed from said order to the Court of Common Pleas, but neither filed nor gave any stipulation that judgment absolute might be rendered against him in the event of affirmance. The Court of Common Pleas affirmed the order appealed from and rendered judgment absolute in favor of C., dismissing H.'s action, with costs. Such judgment has been entered in the Marine Court. An application for leave to appeal to the Court of Appeals has been denied by the Court of Common Pleas. H. was requested to bring this action, and having refused to do so, was made a party defendant.

*Edward P. Wilder*, for applt.

*Robert S. Green*, for respts.

*Held*, That the complaint set up a good cause of action; that the General Term of the Common Pleas had no jurisdiction of the attempted appeal to it. An appeal from an order of the General Term of the Marine Court granting a new trial

is only allowed on condition that the appellant consents to a final judgment against him if the order is affirmed. Laws of 1874, Chap. 545, § 9; 79 N. Y., 221. There could be no appeal or final judgment founded thereon without a consent. The right to give or withhold such consent belongs to the party and not to the court, and cannot be taken away under the guise of correcting a mistake or oversight, and therefore H. was not estopped by having appeared in the appellate court and submitted the appeal to its jurisdiction. His consent to the exercise of jurisdiction could not confer it. 47 N. Y., 67. The judgment of the Common Pleas having been without jurisdiction was void, and its entry in the Marine Court was merely the culmination of an appeal dependent for its validity upon the authority of the appellate court, this is a case in which equity may relieve.

Judgment of General Term, affirming judgment dismissing complaint, reversed and new trial granted.

Opinion by *Finch, J.* All concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. COMMON PLEAS. GENERAL TERM.

James Edwards, *applt.*, v. Lyman N. Jones, *respt.*

Decided May 22, 1884.

When the servant within the scope of his duty enables another by his assent to in-

jure a third person—e. g., by confiding to his care the management of machinery—the master is liable; but the burden of proving this assent is upon plaintiff, and the fact is necessary to his case.

Appeal from a judgment of the General Term of the City Court affirming a judgment dismissing the plaintiff's complaint at trial term.

Action for damages for injury from negligence.

The main contention at the trial was whether or not the person in charge of a hoisting apparatus belonging to defendant, by which the injury was inflicted, sustained a relation to defendant which would make the latter liable for his acts. The testimony on the point was as follows: "The regular driver went away to the water closet and left a strange hand at it (the hoisting apparatus). The strange hand let it go before he was told, and the tub fell, and came down on the boat." On cross-examination the same witness testified: "He (the defendant's driver) left (the horse) and then a strange man took hold." Again: Question. "And while he was gone, this strange man came and took hold of the horse and lifted the spring and started it, and then the tub came down? Answer. Yes, sir."

*J. A. Hyland*, for applt.

*A. C. Anderson*, for respt.

*Held*, That plaintiff was bound to produce proof authorizing the jury to find that the person in charge of the defendant's hoisting apparatus sustained a relation to the defendant which would not

make the defendant responsible for his negligence. If he failed in this, there could be no question for the jury.

This testimony does not show the stranger assumed control with the knowledge or assent of the defendant's servant; one part would support such a conclusion, another is equally strong in favor of the defendant's servants having been ignorant of the stranger's act. In the one case the defendant would have been liable for the stranger's negligence, he having been left in charge by defendant's servant, 29 Barb., 419; 22 N. Y., 385; 9 Daly, 393. If the servant, within the scope of his duty, enabled another by his assent to injure a third party, the master is liable. In the other view, i. e.: that the stranger took control of the hoisting apparatus without the knowledge or assent of the regular driver, the defendant would not be liable, the stranger being an intruder or volunteer. This distinction is clearly deducible from the authorities cited. Plaintiff failed to give evidence authorizing a finding that the strange man took charge with driver's knowledge. The proof was quite as potent in support of the driver's ignorance. For this reason it was right to dismiss the complaint.

Judgment affirmed with costs and disbursements.

Opinion by *Beach, J.*; *Daly, C. J.*, and *Larremore, J.*, concur.



# ASSIGNMENT FOR BENEFIT OF CREDITORS.

N. Y. COMMON PLEAS. GENERAL  
TERM.

In the matter of the assignment  
of Henry Adams, et al.

Decided June 30, 1884.

An unliquidated claim for damages is not  
provable against an assigned estate in the  
hands of an assignee.

Appeal by creditor of assignor  
for benefit of creditors, from judg-  
ment entered on report of Referee.

At the time of the assignment  
the assignors were under contract  
with one Talcott to manufacture  
and supply him with certain silks  
and cottons for a period of several  
years. At the time of the assign-  
ment, the assignors had on hand  
goods manufactured under the con-  
tract and undelivered, and it was  
for profits to be made upon these  
and upon the goods agreed to be  
thereafter manufactured and de-  
livered during the term of the  
agreement, that the claim was  
made. In the affidavit of claim,  
Talcott swore that the insolvent  
firm was indebted to him in the  
sum of \$170,000, but the examina-  
tion disclosed the above facts. It  
was upon the assignment that put  
it out of the power of the assign-  
ors to meet their contract that Tal-  
cott relied as constituting a breach  
thereof, and as the basis of his  
claim.

The Referee disallowed said  
claim.

*Held*, That the claim of dam-  
ages for a breach of contract was

not provable as a debt under the  
assignment. Unascertained claims  
for damages were not provable as  
debts in proceedings in bankrupt-  
cy, and in claims for damages aris-  
ing from breaches of contract in  
indemnity bonds and other possi-  
ble liabilities, the damages must  
be ascertained and fixed before the  
act of bankruptcy to entitle the  
claim to be proved as a debt of the  
bankrupt, unless the contingent  
liability is one that has been speci-  
fically allowed by statute, and the  
actual prospective value of which  
at the time of the bankruptcy is  
capable of being ascertained by  
some mode of computing or esti-  
mating. 1 Mont. & A., 118; 1  
Mont. & Bli., 219; 1 Dea. & Ch., 291;  
1 Barn. & Ad., 698; 9 B. & C.,  
145; 4 Bing., 209; Mont., 27; 3  
Com. Bench, 610.

This applies with more force in  
cases of voluntary assignments for  
the benefit of creditors, for the in-  
strument itself provides how and  
to the payment of what debts the  
property assigned shall be applied,  
and unless the assignment is im-  
peachable for fraud or otherwise  
invalid, the question is one to be  
gathered from a fair construction  
of the instrument and not from  
the provisions of any statute.  
Bishop on Assignments, ch. 27.

This assignment must be deemed  
to direct, as is usual in such in-  
struments, that the estate is to be  
converted into money and applied  
to the payment of the just debts  
of the assignors.

This claim was not a debt with-  
in the intent of the assignment. 2  
Abb. N. C., 261; 2 Hill, 220; 54

How, 320 ; 15 Johns., 467 ; 1 Johns. Cas., 74.

There was no debt of a certain or specific amount due at the time of the making of the assignment, or in fact any debt due then, for it was by the making of a general assignment for the benefit of creditors that the assignors put it out of their power to perform the agreement made with Talcott, and it is this which Talcott relies upon as constituting a breach of the agreement. It is upon this that his claim rests, so that the claim did not come into existence until after the assignment.

Judgment affirmed.

Opinion by *Daly, Ch. J.; Larremore* and *Beach, J. J.*, concur.

#### SPECIAL ISSUES. APPEAL. FRAUD.

#### N. Y. COMMON PLEAS. GENERAL TERM.

Louis Schneider, *respt.*, v. Carl L. Quosbarth, *applt.*

Decided June 30, 1884.

In an equitable action—e. g., for dissolution of partnership and an accounting—where special issues are sent to a jury, the interlocutory and final decrees rest upon the findings at Special Term, without regard to those made by the jury, which latter are in aid of the equity court and may be disregarded by it, and are not matters of review except so far as included in its findings.

Where plaintiff claims to have been induced to enter into a copartnership by false representations, misstatement of profits and over valuation are not alone enough to force plaintiff to his action. Knowledge of falsity and fraudulent intent are equally necessary.

Under ordinary circumstances mere delay

after discovery of the fraud is not a waiver or an affirmation of the contract.

Plaintiff and defendant executed a written copartnership agreement May 20, 1882, in a business which had been carried on by the defendant, and was to commence on July 1 then next. Supplemental agreements were made July 7, 1882, and September 22, 1882. The plaintiff, July 1, 1882, took charge of the store where the goods were sold, and the defendant continued to manage the manufactory. The plaintiff, in October, 1882, filed a bill to annul the copartnership agreement, for an injunction, receiver, and distribution of assets. The relief was asked because of false and fraudulent representations alleged to have been made by the defendant to the plaintiff about the condition and prosperity of the business, relied upon by him and inducing him to enter into the agreement.

Prior to the September agreement, plaintiff, under the evidence, may well have concluded there had been false statements by defendant of prior profits and an exaggerated valuation of assets. He was also disappointed in the business from July to September. Over valuation he sought to remedy by the agreement of July 7th, reducing appraisal twenty-five hundred dollars and decreasing his own cash payment. The agreement of September 22d was an effort to improve the business by decreasing expenses. The plaintiff and the two witnesses who gave him information clearly showing falsity and defendant's intention

to defraud, testify that it was not given until some days after the September agreement. At Special Term issues of fact were framed covering the question of representations and sent before a jury for trial. The jury found in plaintiff's favor, and upon final hearing the findings were adopted, and an interlocutory decree entered dissolving the partnership, setting aside the agreements, with a reference to state the accounts. A final decree was afterwards entered upon the coming in of the referee's report, a receiver having been appointed. The defendant appealed from the final decree, giving notice, bringing up for review the interlocutory decree, an order refusing to modify certain findings by the jury, and one denying motion for a new trial.

*Lemuel Skidmore*, for applt.

*Blumenstiel & Hirsch*, for respt.

*Held*, That the findings of the jury were subject to entire or partial disregard by the Special Term, and no motion for a new trial or appeal from the order denying it was needful or proper. The interlocutory and final decrees rest upon the findings at Special Term, without regard to those made by the jury. The latter were to aid and instruct the conscience of the equity Court, and are not matter of review except so far as included in its findings, and then not because found by the jury, but by the Court.

The conclusions of the Court below adjudicating that plaintiff made the supplemental agreements of July and September, without

notice of the fraud, were based on questions of fact, and were decided upon conflicting evidence. These attempts were not affirmations of the original contract made with knowledge of defendant's fraud, but designed rather to save himself from impending loss. The misstatement of profits and over valuation were not alone sufficient to force the plaintiff to immediately bring suit to rescind the contract for fraudulent representations or lose his remedy. Knowledge of falsity and fraudulent intent on part of defendant were equally necessary.

Under ordinary circumstances mere delay after discovery of the fraud is not a waiver or affirmation of the contract. 67 N. Y. R., 304. If otherwise, no delay is shown in the case.

Judgment affirmed, with costs.

Opinion by *Beach, J.*; *Daly, Ch. J.*, and *Larremore, J.*, concurred.

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#### ARREST. DISTRICT COURTS. N. Y. COMMON PLEAS. GENERAL TERM.

*Max D. Stern, applt.*, v. *Philip H. Moss, respt.*

Decided June 30, 1884.

In an action on contract in the district courts of New York City, where an order of arrest upon facts extrinsic to the cause of action, and shown by affidavits, has been granted and has not been vacated, plaintiff need only prove his money demand to sustain his case, and is entitled to a judgment with a direction therein subjecting defendant's person to execution.

Appeal from judgment of district court.

A summons and order of arrest were served upon the defendant. The pleadings were oral—complaint, for goods sold and delivered; answer, general denial. A motion was made to vacate the order of arrest which had been granted upon extrinsic facts set forth in affidavits showing that the goods had been obtained upon false and fraudulent representations. Counter affidavits were read in opposition thereto.

The motion to vacate was denied. Upon the trial the plaintiff only proved the sale and delivery of the goods in question and non-payment therefor. The defendant offered no proof, but moved to vacate the order of arrest for want of proof to sustain it. The complaint was dismissed.

Plaintiff insists that he was entitled to a money judgment for the value of the goods, together with the direction therein, the words, "defendant liable to execution against his person." From the refusal of the justice to insert such direction and from the judgment rendered this appeal is taken.

*L. H. Mayer*, for applt.

*J. A. Cantor*, for respt.

*Held*, That the process used no longer determines the character of the action in the district court.

Section 10 of the Act of 1857, allowing the commencement of an action by a summons, warrant or attachment, was repealed by § 3209 Code Civ. Pro., which provides that an action brought in the district courts must be commenced by voluntary appearance of the parties or by the service of a summons.

Vol. 19—No. 23.

By § 3210 of the Code, article 3, chapter 19, is made applicable to the district courts. This article includes §§ 2894 to 2904, subject to the qualifications mentioned in § 3211. This latter section provides that existing statutes in relation to the district courts which are not repealed shall still be applicable as to the manner of applying for, granting and executing an order of arrest, etc. An order of arrest in these courts is now to be regarded as a provisional remedy analogous to the practice under § 179 Code of Pro., where the action or contract might be prosecuted irrespective of the right to arrest upon extrinsic facts. Sections 549 and 550, Code Civ. Pro., have no application to arrests in these courts, and subdivision 4 of § 549 is the only statute that requires that fraud in contracting the debt shall be proved upon the trial if the plaintiff suing to recover money due upon a contract seeks the arrest of the defendant.

Section 1304 of the Consolidation Act prescribes the case in which an arrest may be had in an action in the district court. When arrested the defendant may move upon affidavits to vacate the order of arrest. 32 How. Pr., 230. Where the original process was a warrant, the setting aside of the warrant put an end to the action; but the order of arrest obtained under § 1304 of the Consolidation Act is merely a provisional remedy which may be vacated without affecting the summons or the right of the plaintiff to proceed with the action in order that he may recover judg-

ment for his demand. Where the order of arrest is sustained, the plaintiff is entitled to an entry in the judgment, if he recover one, that the defendant is subject to arrest and imprisonment thereon. § 1386, Consolidation Act; 8 Daly, 43. The execution is then to be issued in accordance with the provisions of § 1399.

It seems that § 3018 has no bearing on the question.

Judgment and order vacating order of arrest reversed and new trial ordered, costs to appellant to abide event.

Opinion *per curiam*. *Larremore, J. F. Daly* and *Van Hoesen, JJ.*, sitting.

## NEGLIGENCE. DAMAGES.

### N. Y. COURT OF APPEALS.

*Reed, applt.*, v. The Mayor, etc., of N. Y., *respt.*

Decided Oct. 7, 1884.

The plaintiff in an action against the Mayor, etc., of N. Y., is not restricted in his recovery to the estimated amount of damages stated in the claim filed by him with the Comptroller.

Reversing S. C., 18 W. Dig., 212.

Plaintiff sued the defendant for injuries received by falling on a sidewalk, claiming \$5,000 damages. A statement of the facts constituting the claim was filed with the Comptroller as required by the statute (Laws of 1873, Chap. 335, § 105). Afterwards his injuries became more serious, and he moved to amend his complaint so as to claim \$10,000 damages. This motion was heard on the merits at

Special Term and granted. The General Term reversed the order on the ground that the amount of damages demanded is an essential part of the claim required by the statute to be filed with the Comptroller, and hence this amount cannot be altered after suit brought, but that if plaintiff wished to claim greater damages he must discontinue and file a new demand for the increased amount and bring a new action.

*Charles P. Miller*, for applt.

*D. J. Dean*, for respt.

*Held*, That plaintiff having filed his claim as required the statute was sufficiently complied with, and he is not restricted in his recovery to the estimated amount of damages stated in the claim so filed.

The order of the General Term was by its express terms based solely upon the ground that the amendment was beyond the power of the Court.

*Held*, That the order should be reversed, and the case remitted to the General Term to exercise its discretion in reviewing the order of the Special Term.

*Per curiam* opinion. All concur.

## OBSCENE PICTURES.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. *Muller applt.*

Decided Oct. 7, 1884.

The testimony of experts is not admissible on the question whether pictures or printed words are obscene or indecent.

The fact that the original pictures have been

publicly exhibited will not, as matter of law, exclude a finding that the photographs sold were obscene and indecent.

The intent with which the sale was made is immaterial.

Affirming S. C., 19 W. Dig., 256.

The defendant was convicted of selling obscene or indecent pictures under § 317 of the Penal Code, which makes the selling, loaning, giving away or showing of an obscene or indecent book, writing, paper, picture, drawing or photograph a misdemeanor. Defendant called as witnesses an artist who had practised painting for many years, and also a person engaged in the study of art. They were asked if there was a distinguishing line, as understood by artists, between pure art and obscene and indecent art. This question was objected to and excluded.

*John D. Townsend*, for applt.

*John Vincent*, for respts.

*Held*, No error; that the issue to be tried was whether the particular pictures in question were obscene or indecent. Defendant was entitled to prove in his defense any facts legitimately bearing upon this issue.

It does not require an expert in art or literature to determine whether a picture is obscene or indecent, or whether printed words are offensive to decency and good morals. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen. 1 Greenl. Ev., § 440. A proper test of obscenity in a painting or statue would be whether its motive, as indicated by it, is pure or impure, whether

it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purpose of the representation. L. R., 3 Q. B., 369.

The fact that the original pictures of which defendant sold photographs had been exhibited at the Salon in Paris was admitted by the prosecution, and it was proved that one of them had been publicly exhibited in Philadelphia.

*Held*, That this did not as matter of law exclude a finding by the jury that the photographs were obscene and indecent.

Defendant's counsel requested the court to charge that defendant's intent in selling the pictures claimed to be indecent and obscene is an important element in determining his guilt. This request was refused.

*Held*, No error; that the statute makes the sale of such a picture a misdemeanor and no exception is made by reason of any intent in making the sale.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Andrews, J.* All concur.

## CORPORATIONS. STOCKS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Margaret Dunn, *respt.*, v. The Star Fire Ins. Co. of N. Y., *applt.*

Decided Oct. 8, 1884.

The delivery of a certificate of stock, with a power of attorney authorizing the person to whom such certificate is given to transfer to himself the shares represented by it upon the books of the corporation, will transfer the title to the shares to the person receiving these evidences of right without the formal transfer of such shares upon the books of the corporation; and if, before such transfer upon the books of the corporation, the shares are seized under an attachment issued in an action against the person in whose name they stand, such seizure gives the attaching creditor no right whatever to them, and forms no legal obstacle to the transfer of such shares upon the books of the corporation; and a refusal on the part of the corporation, on account of such attachment, to make such transfer, renders it liable for the value of the shares.

The fact that a certificate of stock is presented at the office of a corporation to a person apparently in charge of it, and a request made to him for the transfer of the shares upon the books to the person presenting such certificate, which request is refused by him, is sufficient, in the absence of evidence to the contrary, to warrant the conclusion, in an action to recover damages for such refusal, that he had the authority to represent the company and to bind it by such refusal.

Appeal from a judgment recovered upon the verdict of a jury and from an order denying a motion for a new trial.

The husband of the plaintiff, in whose name certain shares of stock which had been bought by him for plaintiff with her money stood upon the books of defendant, delivered to her the certificate of such shares, with a power of attorney authorizing her to transfer the shares upon the books of the corporation. Subsequently such certificate was presented at the office of the company to a person

who was apparently in charge of it, and a request made to him that the stock should be transferred upon the books to the plaintiff. He refused to make the transfer, excusing himself for his refusal because of an attachment under which they had been seized, which had been issued in an action against the plaintiff's husband subsequently to the delivery of the certificate and power of attorney to the plaintiff. This action was brought to recover damages for such refusal to transfer the stock.

*William G. Wilson*, for applt.

*Alfred J. Baker*, for respt.

*Held*, That although it did not appear otherwise than by these circumstances above set forth that the person in charge of the office was authorized to represent or bind the company, yet these facts were sufficient, in the absence of evidence to the contrary, to justify the conclusion that he had the authority to represent the company and to bind it by his refusal to transfer the shares. That the delivery of the certificate of the shares to the plaintiff, together with the power of attorney authorizing her to transfer them upon the books of the company, transferred the title to such shares to her without their formal transfer upon the books of the corporation. 7 Lans., 317. And since, thereafter, the plaintiff's husband had no interest, either legal or equitable, in them, their formal seizure under the attachment issued in the action against him gave the attaching creditor no

right whatever in them, 61 N.Y., 583, and formed no legal obstacle in the way of transferring the shares upon the books of the corporation; and the refusal to transfer such shares was consequently wrongful, and authorized the plaintiff to recover their value from the defendant. 22 Wend., 347; 3 Daly, 218.

Order and judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## CONSTITUTIONAL LAW.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re Peter Jacobs, applt.*

Decided Oct. 8, 1884.

Chap. 272, Laws 1884, prohibiting the manufacture of segars in certain classes of tenement houses in certain cities, is unconstitutional as unlawfully interfering with the right of every person to employ his labor in any occupation not inimical to the public peace, safety or health, for although passed ostensibly with the purpose of improving the public health, it is within the power of the Court to inquire whether such is its actual purpose, and it is apparent from its provisions that such was not the intention of the Legislature in enacting it.

Appeal from order of Special Term, dismissing writs of *certiorari* and *habeas corpus*, and remanding appellant to custody for violation of Chap. 272 of the Laws of 1884.

The only question raised in the proceeding was the constitutionality of the act under which the appellant was arrested and which was entitled "An act to improve

the public health by prohibiting the manufacture of segars and preparation of tobacco in any form in tenement houses in certain cases, etc.," and which prohibited, in cities of the State having over 500,000 inhabitants, the manufacture of segars or preparation of tobacco in any form, on any floor, or in any part of any floor, in any tenement house, if such floor, or any part of such floor, was occupied by any person as a home or residence, for the purpose of living, sleeping, cooking, or doing any household work therein; defining a tenement house within the meaning of the act to be any house, building, or portion thereof, occupied as the home or residence of more than three families, living independently of one another, and doing their cooking upon the premises; and excepting from the prohibition the first floor of said tenement house on which there should be a store for the sale of segars and tobacco.

It was argued on behalf of the appellant that this act was unconstitutional as interfering with the inherent right of every person to employ his labor in any lawful occupation chosen by him; while, on the other hand, it was argued that this right was subject to an exception or limitation permitting the enactment of laws which may regulate or limit, or restrain its enjoyment by police regulations to preserve the public peace, safety or health, and that the Legislature was the sole judge of what laws are necessary or requisite to those ends.



*Wm. M. Everts, A. J. Dittenhoeffer, and Morris S. Wise, for applt.*

*Peter B. Olney and John Vincent, for the People.*

*Held,* That it may be stated as a legal and political axiom that since the great laboring masses of our country have little or no property but their labor and the free right to employ it to their own best interest and advantage, it must be considered that the constitutional inhibitions against all invasions of property without due process of law was as fully intended to embrace and protect that property as any of the accumulations it may have gained, and it is not constitutionally competent, therefore, for the Legislature to deprive, by any arbitrary enactment, a laborer in any lawful vocation of his right to work and enjoy the fruits of his work in his own residence and in his own way, except for the purposes of police or health regulations.

That, in determining the constitutionality of such a law, the Court must inquire whether the act is a valid exercise of the power of the Legislature to enact police regulations to preserve public health or safety, and in order to be a valid exercise of such power the act must do more than profess to be of that kind; it must be so in reality and not something else in the guise of such a purpose.

That it is apparent from a study of the face of the act in question that its aim was not "to improve the public health by prohibiting the manufacture of segars and

preparation of tobacco in any form in tenement houses, in certain cases, etc.," as declared in the title, but to suppress and restrain such manufacture in the cases covered by the act, for the purpose of preventing successful competition injurious to other modes of manufacturing the same article.

That there is abundant evidence of this object upon the face of the act—First, all tenement houses having more than three, or more than twenty families living in common, or not doing their cooking on the premises, are not within the act, and certainly if health were the object all such tenements would be embraced.

Again, the first floor of the designated tenement is exempt from the operation of the law if, in addition to the manufacture, there be a store for selling segars and tobacco on that floor, although that fact, if health were the object, should be a reason for more stringent restriction instead of exception, for it would cause the floor to be the resort of more persons whose health might be exposed.

Then, again, the act has no regard to the size of the floors in the designated tenements, and although there may be ten or twenty rooms isolated so as to have no communication with each other, yet the bare fact that some person eats or sleeps, or lives in one of the most distant rooms of the floor, without communication or connection with that used for the business, makes it a crime to manufacture segars in any other room on that floor.

Then, too, under this act the whole of one floor may be used for the manufacture of segars, etc.; while the several other floors of the house may be occupied by persons who live, sleep and cook there, and yet the case will not be within the statute, and if the aim be to protect health why is not such a case brought within the prohibition.

If it be argued that the intention was to protect the health only of persons who live, etc., on the floor containing the room in which the manufacture of the tobacco is carried on, why, it may be asked, is the exception made which allows the health of such persons to be exposed, if there be a store for the sale of tobacco on that floor, and why should the act be made to apply only to those tenements occupied by three or more families? Under the act, if there be but three families occupying the house, either may manufacture segars or tobacco on a floor and in the living rooms of any number of people, without limit, but if there be four families in the tenement no one can manufacture segars on any floor which is by any one person occupied for doing any household work whatever.

Moreover, if the promotion of the public health were the purpose of the act, why were cities having less than 500,000 inhabitants omitted from its operation? If it were necessary for cities of over that population, it was equally so for cities under it, and the exclusion of cities of the latter class is strong evidence that other reasons than

the protection of health produced the passage of the act.

That it is impossible to hold that this act is a police enactment to preserve public health, because it clearly fails to accomplish that purpose to any reasonable extent, but on the contrary it does quite another thing, and is so unjust in its inequalities, so harsh and oppressive upon the labor of poverty, so keenly discriminative in favor of the stronger classes engaged in the same occupation, that it certainly ought not to have been enacted, but being enacted ought to be held invalid because it deprives the appellant of his right and liberty to use his occupation in his own house for the support of himself and family, and takes away the value of his labor, which is his property, protected by the Constitution equally as though it were in lands or money, without due process of law.

Act adjudged unconstitutional, order reversed, and appellant discharged.

Opinions by *Davis, P. J.*, and *Daniels, J.*; *Brady, J.*, concurred.

#### PRACTICE. EXAMINATION OF PARTY BEFORE TRIAL.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

The Mechanical OrguINETTE Co.,  
*applt.*, v. John C. Haynes et al.,  
*respl.*

Decided Oct. 8, 1884.

The rule applicable to the granting of an examination of a party before trial in a case

involving matters which might subject the party examined to a criminal prosecution is, that where it clearly appears that the only material evidence in the case that can be called out from the party sought to be examined beneficial to the other party must of necessity tend to establish his criminal guilt the Court will not require examination before trial; but where it appears that any testimony material to the case may be given which has not of necessity that tendency the examination may be had, leaving the party to assert his privilege if he chooses not to answer such questions as have that tendency.

In an action in which several of the defendants are charged with having obtained property by means of a fraudulent conspiracy, an examination before trial of a defendant to whom it is alleged that such property was transferred with notice or knowledge of such conspiracy, and without consideration, as to such notice or knowledge and the consideration paid by him, is proper.

Appeal from an order vacating an order for the examination of the defendant Stafford before trial.

The complaint in this action charged several of the defendants with obtaining by fraudulent conspiracy the assignments of certain patents to themselves and went far enough to show, if its allegations were true, that those defendants were guilty of a consummated criminal conspiracy amounting to a misdemeanor. It charged also that the property so obtained was afterward sold and transferred by the conspirators to the defendant Stafford with knowledge or notice on his part of the alleged fraudulent conspiracy or without the payment of any valuable consideration. An order was obtained by the plaintiff for the examination of Stafford, before the trial, as to

his knowledge or notice of the alleged fraud of the other defendants and as to the question of consideration paid by him. A motion was made to vacate this order upon the ground that the answers upon such examination would necessarily tend to criminate said defendant, and this motion was granted by the court.

*Herbert T. Ketcham*, for applt.

*Thomas B. Smith*, for deft. Stafford.

*Held*, That such an examination of the defendant Stafford was allowable. That it did not follow, because he took the property with knowledge or notice of the fraudulent conspiracy by which the other defendants obtained it, that he was therefore guilty of their misdemeanor consummated some time before, and the plaintiff had a clear right to examine him and to establish, if possible, by his evidence, any fact showing actual or implied notice of the wrong of his vendors or assignors which at law or at equity tended to impeach his title as a purchaser or assignee.

That the rule in such a case is, that where it clearly appears that the only material evidence in the case that can be called out from the party sought to be examined beneficial to the other party must of necessity tend to establish his criminal guilt the court will not require examination before trial, because of the inutility of such an examination. But where it appears that any testimony material to the case may be given which has not of necessity that tendency

the examination may be had, leaving the party to assert his privilege if he chooses not to answer such questions as have that tendency.

Order reversed.

Opinion by *Davis, P. J.*

*Daniels, J.*, agreed that the defendant Stafford might be lawfully compelled to answer any questions tending to prove the fact that he acquired whatever rights were claimed by him with either actual or constructive notice of the alleged fraudulent conspiracy, and as that was as far as the opinion of *Davis, P. J.*, went he also agreed to the disposition of the appeal therein directed.

*Brady, J.*, concurred with *Daniels, J.*

## TAXATION. CORPORATIONS.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. The Equitable Trust Co. of New London, Conn., *applt.*

Decided Oct. 7, 1884.

Defendant, a foreign corporation, had an office for business in New York City, but little of its property was in this State and but little of its business done here. For the year ending November 1, 1881, it reported that no dividend had been made or declared, and filed an appraisal of its capital stock, upon which a tax of  $1\frac{1}{2}$  mills was laid. *Held*, That the tax was one upon the business of defendant done in this State, and was valid.

This action was brought by the Attorney-General against defendant, a foreign corporation, to recover a tax which it is claimed should have been paid under § 2,

Chapter 542, Laws of 1880, as amended by Chapter 361, Laws of 1881. Defendant, a Connecticut corporation, has been engaged for many years, through its officers, who reside in that State, in the business of negotiating loans on mortgages in the Western States, or the purchase of obligations secured by mortgages in those States, and selling securities based on those loans and obligations. During the year ending November 1st, 1881, it was engaged principally in caring for its business of previous years and looking after its real estate. Its sales were very light and were mostly made in foreign countries. During eight years prior to the commencement of this action it had an office for the transaction of business in the City of New York, but a very small portion of its property was within this State, and but little of its business was done here. On November 10, 1881, its treasurer made a report in writing to the Comptroller of this State, showing that during the year ending November 1 it had not made or declared any dividend on its capital stock, and its secretary and treasurer also sent to the Comptroller an appraisal of its capital stock, as required by the statute, showing its actual cash value to be \$1,050,000. A tax of one and a half mills upon that sum is sought to be recovered in this action.

*Thomas Thacher* and *Julien T. Davies*, for *applt.*

*Denis O'Brien*, Atty-Gen'l, for *respt.*

*Held*, That the tax was one upon

the business of defendant done in this State, and was valid ; that, it being a specific tax, no apportionment or appraisal was required. 4 N. Y., 419.

The power of taxation possessed by the State may, with some exceptions imposed by the Federal Constitution and laws passed in pursuance thereof, be exercised upon all objects within the State, and trades or vocations and other business, carried on within the State, under the protection of its laws, whether by citizens or non-residents, may be taxed—but non-residents' property having no legal *situs* here, and business not carried on here, cannot be taxed in this State. 15 Wall., 300.

A foreign corporation cannot be taxed in this State on account of its corporate franchise. 93 N. Y., 592.

In passing upon a statute the natural presumption is that the Legislature did what it had a right and power to do. 93 N. Y., 328.

The power of taxation may be exercised by the Legislature upon all objects within its jurisdiction which it concludes should bear a portion of the public burdens by a general property tax to be apportioned upon all the property within the State, according to appraised values, by a poll tax imposed upon all the citizens of the State, or by taxes upon specified articles of personal property, or upon avocations, trades and business. 4 Wheat., 428, 430 ; 4 Peters, 561.

As to whether a foreign corporation that keeps an office in this

State merely for the record and transfer of its stock, while it does its business elsewhere, can be considered a corporation doing business in this State within the meaning of the statute, *quære*.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.* All concur, except *Andrews, J.*, not voting.

### CONTRACT.

N. Y. COURT OF APPEALS.

Silberman et al., *respts.*, v. Clark et al., *appls.*

Decided Oct. 7, 1884.

Plaintiffs purchased steel rails at a specified price "f o. b. (free on board), continental port; inspection at makers' works," payment by letter of credit. The letter of credit for the full amount of the rails was given but plaintiffs were obliged to pay for inspection. In an action to recover the amount so paid, *Held*, That the contract was not ambiguous, and could not be varied by parol evidence; that the words "free on board" and the provision for inspection were to be construed together, and that plaintiffs were only bound to pay the amount named.

This action was brought to recover for money paid by plaintiffs for the inspection of steel rails bought by them of defendants. The purchase was made under a contract dated Feb. 20, 1880, which required the rails (4,000 tons) to be "first-class German make, usual good merchantable, free from flaws and cracks and all imperfections; price nine pounds two shillings and sixpence per ton, f. o. b., continental port; inspec-

tion at makers' works; payment by J. & W. Seligman's letter of credit on London, at four months' date, to be furnished within four days." In pursuance of this contract plaintiffs delivered to defendants a letter of credit signed by J. & W. Seligman & Co., dated March 6, 1880, for £36,500, the precise price of the 4,000 tons, which provided that certificates of inspection, certified invoices and bills of lading should accompany each draft upon the credit. It was proved that the letters "*f. o. b.*" meant "free on board" the vessels which were to bring the rails to this country. Evidence was offered and excluded of the custom in such cases.

*Charles C. Beaman*, for appls.

*Albert A. Abbott*, for respts.

*Held*, No error; that there being nothing ambiguous in the contract it could not be varied by parol evidence. Plaintiffs were bound only to pay through the letter of credit the price named. Inspection was one of the things to be done in pursuance of the contract, and the expenses of that, as well as all other expenses touching performance, were to be borne by the vendors. The words "free on board" and the provision as to inspection are to be construed together.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Earl, J.* All concur.

## DOWER. WILLS.

### N. Y. COURT OF APPEALS.

*Adams et al., exrs., appls., v. Benson et al., exrs., respts.*

Decided Oct. 7, 1884.

Where testator by his will gives to his wife a certain sum which is to be accepted and received by her in lieu and bar of her dower and of all claims she may have upon or against his estate as his widow, she takes no portion of a dower interest in that part of the estate undisposed of by reason of legacies having lapsed or invalid dispositions in other ways. Such lapsed legacies fall into the residue, and pass to the residuary legatees.

To ascertain the amount of a general residue, all income of the estate not otherwise disposed of must be added to the residue. Modifying S. C., 18 W. Dig., 266.

One B. died in January, 1881, leaving a will dated February 4, 1876, and leaving a widow and next of kin, but no children. He devised to his wife a house and the furniture, paintings, books, horses and carriages, and \$150,000, which sum he directed his executors to pay within three years after his death, at such times and in such amounts as they in their discretion should think proper, and until full payment to pay her semi-annual interest upon the sum unpaid, to be computed from the time of his death. He also directed that the legacy to his wife should take precedence in payment over all the other legacies given in his will; and he gave various other legacies, among which was one of \$25,000 to his brother W., and one of \$3,000 to G., a cousin. Two-fifths of the residue of his estate he gave to his brother W., one-fifth to

each of his two nephews, and the remaining fifth to his executors, in trust, to invest the same and receive and pay the income to his wife during her life, and after her death to pay the principal to his brother W. and his two nephews in equal shares. After the devises and bequests, the will provided: "It is my will, and I do hereby declare that the devises and bequests hereinbefore made to and for the benefit of my beloved wife \* \* are made and shall be accepted and received by her in lieu and bar of her dower and of all claims she may have upon or against my estate as my widow." W. and G. both died before the testator, who knew of their deaths. It was conceded that the legacies to them lapsed, and the share of W. in the residue lapsed, and as to such share the testator died intestate. The widow accepted the provision made for her in the will. Her executors claim that they are entitled as such to one half of the lapsed legacies.

*B. F. Tracy*, for applts.

*Jasper W. Gilbert and Thomas H. Rodman*, for respts.

*Held*, That the testator intended to bar his wife from any further share in his estate than such as the will provided, and she having elected to accept such provision her legal representatives were bound thereby. 3 S. & G., 83; 43 N. Y., 424.

*Pickering v. Stanford*, 2 Ves., 272, 581; 3 id., 332, 492; overruled.

*Also held*, That the lapsed legacies to W. and G., under the resi-

duary clause, fell into the residue and passed to the residuary legatees. *Roper on Legacies*, 496; *Wms. on Exrs.*, 1044; 2 Redf. on Wills, 442; 18 Beav., 417, 427; 4 Paige, 115; 9 id., 94; 3 Edw. Ch., 79; 4 Barb., 80. While a testator may so circumscribe and confine the residue that the residuary legatee will be a specific legatee and not entitled to any benefit accruing from lapses unless what shall have lapsed constitutes a part of the particular residue, very special words are required to take a bequest of the residue out of the general rule. 2 J. & W., 406.

*Kerr v. Dougherty*, 79 N. Y., 327, distinguished.

There were a number of legacies in terms payable within three years, without interest.

*Held*, That the income of the funds set apart or held for the payment of these legacies should have been added to the residue.

The Supreme Court held that the widow was entitled to the interest on the share of the residue put in trust for her from the death of the testator.

*Held*, No error; such interest formed no part of the residue. 36 N. Y., 15; 2 Redf., 434; 6 Paige, 298; 103 Mass., 299. One-fifth of the two lapsed legacies should have been added to the residuary estate which was to be held in trust for the widow.

The will provided that the four-fifths of the residue not put in trust for the widow should not be paid until at the end of one year from the death of the testator.

*Held*, That the income of those

shares for one year, except as to the two-fifths which lapsed, being otherwise undisposed of, went into and formed a part of the residue. To ascertain the amount of a general residue all the income of the estate not otherwise disposed of must be added to the residue. In this case all the interest for one year, on so much of the residue as did not lapse, excluding the widow's fifth, to wit., on two-fifths thereof, should have been added to the residue, so as to make up the true amount from which the one-fifth of principal was to be taken and held in trust for her.

Judgment of General Term, affirming decree of surrogate, modified, and remitted to surrogate for judgment.

Opinion by *Earl, J.* All concur.

## FRAUD. AGENCY. EVIDENCE.

### N. Y. COURT OF APPEALS.

*Krumm, respt., v. Beach et al., appls.*

Decided Oct. 7, 1884.

In an action for fraud on the sale of land it appeared that defendant B. contracted to sell the land, which belonged to his wife, and made the false representations; that the wife, S. B., conveyed to plaintiff and retained the bulk of the purchase money. The answer admitted the purchase from S. B. *Held*, That B. assumed to act as the agent of his wife; that she so ratified his agency as to make the contract one with herself, and that the receipt and retention by her of the bulk of the proceeds rendered her liable for the fraud, although she was innocent of it and did not personally participate in it.

In such an action evidence of the value of other land represented to be owned by the

vendor and included in the conveyance, but which was not so owned or conveyed, is admissible as bearing on the question of damages, and also to show intent to defraud.

This action was brought to recover damages for a fraud committed in the sale of lands. It appeared that on July 15, 1876, plaintiff entered into a contract with defendant, E. W. B., for the purchase of the lands in question. The contract was made in his name, and the fraud alleged consisted in representations made by him. The lands belonged to defendant S. B., who was the wife of E. W. B.; the making of the false representations and contract of sale were unknown to S. B. until after the conveyance. The consideration paid was \$2,400, of which S. B. received \$1,900. The allegations of the complaint make S. B. a contracting party as a recognized and named principal, and asserts that plaintiff bought of her and that she sold to him. The answer expressly admits the purchase from S. B., and alleges "that these defendants were each ignorant of the exact boundaries of said lands, and so informed" the plaintiff, and only pointed out and exhibited to plaintiff lands owned by S. B., and which were the same lands conveyed. The defendant S. B. moved for a nonsuit, on the ground that her husband assumed to act as her agent, and was the sole principal in the contract; that she had sold to her husband upon terms between themselves, and conveyed to the purchaser at the husband's request and in performance of those terms.



The answer set up no separate defence for the wife.

The motion was denied.

*David F. Day*, for applts.

*George M. Osgoodby*, for respt.

*Held*, No error; that the averments of the answer show that E. W. B. assumed to act as agent for his wife, and that she so ratified his agency as to make the contract a contract with herself as well as her husband, and that the receipt and retention by her of the bulk of the proceeds rendered her liable for the fraud, although she was innocent of it and did not personally participate in it. 21 N. Y., 238; 43 id., 288; 51 id., 34; 93 id., 643.

The Judge charged that the damages recoverable would be the difference between the value of the land conveyed and the value of that which would have passed had the representations been true. No exception was taken to the charge, except one "to the charge and the whole thereof." The charge covered three printed pages of the case, and deals with numerous questions.

*Held*, That the exception was ineffectual for any purpose.

Upon the trial plaintiff offered to show the value of twenty acres represented to be included in the ownership of S. B. and in the intended sale, but in fact neither so owned or conveyed. Defendants objected on the ground "that the same did not afford the true measure of plaintiff's damages." The objection was overruled and an exception taken.

*Held*, No error; that the objection furnished no sufficient reason for rejecting the proof; that the evidence was admissible as bearing on the question of damages as furnishing an element needed in their computation, and was also admissible to show intent to defraud on one side and an injury suffered on the other.

*Also held*, That while plaintiff could have sued for a rescission of the contract and a recovery back of the consideration paid after an offer to reconvey and a tender of what he had received, he was not compelled to adopt this remedy, but could stand upon the contract and require of the vendor its complete performance, or such damages as would be equivalent to a complete performance. 13 Johns., 325; 7 Wend., 386; 1 N. Y., 305; 9 id., 197; 58 Barb., 385. Such an action can be maintained whether the representations relate to the title or to matters collateral to the land.

The measure of damages is full indemnity to the injured party. 10 Wend., 155; 13 Johns., 325; 1 N. Y., 305.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

## PRACTICE.

### N. Y. COURT OF APPEALS.

*Emmerich, respt.*, v. *Heffernan et al.*, *applts.*

Decided Oct. 7, 1884.

Under the general power of the Court to correct and set aside its orders and judgments it has power to vacate at the same term an order dismissing a complaint and grant a new trial.

Upon the trial of the above entitled action, at Circuit, the complaint was dismissed on the ground that it did not state facts sufficient to constitute a cause of action. Plaintiff excepted. He subsequently moved, at the same term and before the same judge, to vacate the order of dismissal and for a new trial, and that the case be restored to the calendar. On the hearing of that motion defendant's counsel consented to the making thereof, and waived all questions as to its regularity and plaintiff's right to make it. This motion was granted, the judge being satisfied that the order of dismissal had been inadvertently granted, defendant's consent and waiver being recited in the order. Defendant appealed from said order to the General Term, where his appeal was dismissed, and from such dismissal he appeals to this Court.

*A. R. Dyett*, for applts.

*Wm. G. McCrea*, for resp't.

*Held*, That under the general power of the Court to correct or set aside its own orders and judgments the order vacating the order of dismissal was valid. The consent of defendant to the making of the motion and his express waiver are a full answer to any objection of irregularity in making the order.

The only point discussed in the opinion of the General Term was the jurisdiction of the judge at the

Circuit to make it, and it held it was not a question of jurisdiction but of regularity merely and defendant's consent precluded her from raising that question, and dismissed the appeal. It was claimed that it should have remanded the case to the Circuit to pass upon the merits.

*Held*, Untenable; as in the present case it would have been an idle ceremony to have pursued the course insisted upon. It would have been technically more correct if the General Term had affirmed the order of the Special Term.

Order of General Term, dismissing appeal, affirmed.

Opinion by *Rapallo, J.* All concur.

## LAND CONTRACT.

N. Y. COURT OF APPEALS.

*Hellreigel, resp't., v. Manning, applt.*

Decided Oct. 7, 1884.

Before a purchaser of land can successfully resist performance of his contract on the ground of defect of title there must be at least a reasonable doubt as to the vendor's title, which affects its value and would interfere with a sale to a reasonable purchaser. A defect in the record title may be removed or cured by parol evidence.

One who agrees to sell and convey premises at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in repair or guard against natural decay.

This action was brought to compel defendant to specifically perform a contract for the purchase of real estate, and was based upon a written agreement, signed, sealed and acknowledged by defend-

ant, dated Sept. 17, 1876, whereby, in consideration of fifty dollars paid to him by plaintiff, defendant agreed that if at the end of four years plaintiff became dissatisfied with his purchase and called upon him to do so, he would pay him for his undivided one-half interest in the land \$3,800, on condition of his executing and tendering to defendant a deed "by a good title free of incumbrances." At the end of four years plaintiff tendered to defendant a deed of the land and demanded performance on his part, which was refused on the ground that there was a defect in plaintiff's title. It appeared by the records in the county clerk's office that on May 15, 1861, one Clark conveyed the land to Electa Wilds and on April 11, Electa Wilder conveyed the same premises to one S. There was no deed from Electa Wilds. The title was held and the land occupied without dispute under the deed from Electa Wilder from April, 1867, to the trial of this action in 1881. The deed to S. had been destroyed after the title had passed out of him, but a mortgage given by S. for purchase money was produced, in which Electa Wilds was the mortgagee. The commissioner of deeds who drew the deed to S. and took the acknowledgment thereof was produced as a witness by plaintiff and he testified that the grantor in the deed to S. was Electa Wilds, and so S. also swore. It also appeared that the grantor of S. was the grantee of Clark, who was her brother, and that the final letter

in Wilds was so written that undoubtedly it was mistaken for an r by the recording clerk. The trial court held that there was in fact no defect in plaintiff's title.

*H. C. Day*, for applt.

*Spencer Clinton*, for respt.

*Held*, No error.

A purchaser of land cannot justify his refusal to perform his contract by a mere captious objection to the title tendered. It is not sufficient for him, when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can resist successfully performance of his contract on the ground of a defect of title there must be at least a reasonable doubt as to the vendor's title, such as affects its value and would interfere with its sale to a reasonable purchaser. A defect in the record title may be cured or removed by parol evidence. *Hopk.*, 436; 26 *Wend.*, 229; 2 *Duer*, 153; 45 *N. Y.*, 234; 56 *id.*, 337; 86 *id.*, 575.

Defendant's counsel "offered to show the circumstances under which he was drawn into making the contract." When asked if he was induced by fraud to enter into the contract, he replied in the negative and stated he wished to show the circumstances under which defendant entered into the contract as bearing upon the equitable enforcement of the contract. The offer was excluded. There were no allegations in the answer that the contract was unfair, inequitable, unreasonable or unconscion-

able, or that defendant was overreached or induced to enter into it by unfair means.

*Held*, That the offer was properly excluded; defendant should have made it more specific.

Defendant offered to prove that during the four years plaintiff had held the property he had not kept them in repair, and that in consequence it has depreciated several hundred dollars in value. The answer did not allege that plaintiff had done anything intentionally or wilfully to damage the property or depreciate its value. The contract does not provide that plaintiff shall keep the premises in repair. The deterioration seems to have been due to natural causes and ordinary use. There was no allegation in the answer and no proof that the premises were not worth what defendant had agreed to pay for them, or that plaintiff had received more than a fair interest in rents.

*Held*, That under the circumstances plaintiff did not owe defendant any duty to keep the premises in repair.

A party agreeing to sell and convey premises at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair, or to guard against the decay which is due to time and ordinary use.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.* All concur, except *Danforth, J.*, absent.

## PRACTICE. EVIDENCE.

### N. Y. COURT OF APPEALS.

Learned, *applt.*, v. Tillotson, *respt.*

Decided Oct. 7, 1884.

The verdict of a jury on a specific issue submitted to them in an equity action is not obligatory upon the court on the trial of the entire case; nor will a motion for a new trial on the minutes after the verdict and its denial preclude the court from disregarding the verdict.

A letter written long after a transaction, stating the facts relating to it and the agreement of the parties, is a mere declaration of the writer in his own behalf, and is not admissible. The silence of the party addressed cannot be considered as an admission of the truth of the statements in the letter.

This is an appeal from a judgment of the General Term, affirming a judgment dismissing the complaint in an action for an accounting under an alleged partnership agreement. The evidence in reference to the partnership agreement was conflicting. A specific question of fact as to the existence of said agreement had previously been submitted to a jury and a verdict rendered in plaintiff's favor. The subsequent trial was before another judge upon oral testimony as well as the testimony upon the former trial. It was claimed by plaintiff's counsel that the Court could not disregard the verdict of the jury on the former trial.

*Albert Stickney*, for *applt.*

*Joseph H. Choate*, for *respt.*

*Held*, Untenable; that the practice of the Court of Chancery has not been changed, viz.: that the

finding of specific issues, tried before a jury when ordered, was not a final determination of such issues. The verdict of the jury was not conclusive, and could only be read on the hearing with full power in the Court to follow or reject it, as might be deemed best. It was only a part of the evidence, and if for any reason it was deemed unauthorized it could be rejected and was not obligatory upon the Court. The object of such a proceeding was auxiliary to the action of the court, and simply advisory. If the verdict was not set aside the Court was authorized to give it such weight as it determined it was entitled to. It could treat it as entirely conclusive, and dispense with other evidence upon the issues presented, or allow other evidence to be given, or entirely disregard the verdict and find the fact according to its own judgment. Dan. Ch. Pr., 1146; 19 Ves. Jr., 494, 499; 3 V. & B., 41; 20 Wal., 670, 680; 101 U. S., 247; 47 N.Y., 119; 51 id., 43; 52 id., 471, 474. This practice was not changed by the Code of Procedure, nor has it been changed by the Code of Civil Procedure. The provisions of the latter, §§ 972, 1003, that questions not submitted to a jury must be tried by the court, is not a declaration that the questions submitted to the jury must not be tried by the court. It simply provides in what manner the issues not tried shall be tried, leaving the issues which have been tried to be determined the same as formerly upon the final hearing. The right and

power to try and determine all the issues in the case could not be taken away without express words to that effect and a clear intention manifested by an enactment for that purpose.

*Also held*, That a motion for a new trial upon the minutes, after the verdict, and its denial, does not preclude the court upon a trial of the entire case from disregarding the verdict.

A letter from plaintiff to defendant, containing a statement of plaintiff's claim against defendant, but written long after the alleged agreement was entered into, was offered in evidence and rejected.

*Held*, No error; that the letter could not be regarded as part of the *res gestæ*. Taylor on Evi., § 585; 1 Wall., 637; 7 H. & N., 786, 796.

Ridley v. Gyde, 9 Bing., 349; Thorndike v. City of Boston, 1 Metc., 242; Keen v. Priest, 1 F. & F., 314; Roe v. Day, 7 C. & P., 705; Gaskill v. Skene, 14 Q. B., 664; Fenno v. Weston, 31 Vt., 345; Allen v. Peters, 4 Phila., 84, distinguished.

A letter written long after a transaction has taken place, stating the facts relating to it and the agreement of the parties, under ordinary circumstances, is a mere declaration of the party in his own behalf, which does not demand an answer, and the silence of the party cannot be considered as an admission of the truth of the statement made and binding upon him. 93 N. Y., 567, 571; 4 Daly, 233; 2 Hall, 40; 7 Gray, 92; 29 Vt.; 3 Hun, 304; 3 C. & P., 103;

15 M. & W., 166; 3 Mac. A. D. C., 81.

A distinction exists between the effect to be given to oral declarations made by a party to another which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. In the latter case there is no rule of law requiring a person to enter into a correspondence with another in reference to a matter in dispute between them, or that silence should be regarded as an admission against the party to whom the letter is addressed.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Miller J.* All concur, except *Danforth, J.*, absent.

## NEGLIGENCE.

### N. Y. COURT OF APPEALS.

Walsh, *applt.*, v. The Trustees of the N. Y. & Brooklyn Bridge Co., *respt.*

Decided Oct. 7, 1884.

The Bridge Trustees are either the agents of the state or of the cities of New York and Brooklyn, and are not the legal superiors of the laborers at work on the bridge, nor liable for their negligence.

The trustees are responsible only for their own personal misconduct or negligence.

A laborer employed on the New York and Brooklyn Bridge, during its construction, carelessly let a plank fall from the suspended structure which struck and injured the plaintiff, who was at the

time passing upon a street in the city of New York, and he brought this action to recover for his injuries. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action and the demurrer was sustained.

*Charles J. Patterson*, for applt.

*W. N. Dykman*, for respt.

*Held*, No error; that the bridge trustees were either agents of the State or of the two cities of New York and Brooklyn for the construction of the bridge, and hence were not the legal superiors of the laborer, and were responsible only for their own personal misconduct or negligence. 2 Hill, 432; 3 id., 531; 2 Den., 433; 91 U. S., 540; 66 N. Y., 413; 96 id., 264.

*Ex parte* The Newport Trustees, 16 Sim., 346; Murry Dock Cases, 11 H. of L. Cas., 687; distinguished.

Chapter 30, Laws of 1875, utterly wiped out the Bridge Company and vested the property of the corporation in the cities of New York and Brooklyn, and no new corporation was created, a corporation not being needed to accomplish any of the provisions of said act.

*Also held*, That the trustees are entitled to all the immunities of public agents charged with a duty which from its nature could not be exercised without availing themselves of the services of others, and the doctrine of *respondet superior* does not apply to such cases.

As to whether the cities of New York and Brooklyn were liable for

the injuries received by plaintiff, *quære*.

Judgment of General Term, sustaining demurrer, affirmed.

Opinion by *Earl, J.* All concur.

## CONSTITUTIONAL LAW. STATUTES.

N. Y SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

The Fire Dept. of the City of New York, *respt.*, v. Albert P. Sturtevant et al., *appls.*

Decided Oct. 8, 1884.

The powers conferred by statute upon the Fire Department of the City of New York to require by proper notice the construction of fire escapes upon hotels, &c., are clearly constitutional and are to be exercised under the directions of the statutes and in accordance with the sound discretion of the Fire Department, and courts of justice will not interfere with the exercise of those powers unless that exercise is so clearly improper that any intelligent mind can see the plain and manifest injustice and unreasonableness of the demand.

Under § 2, Ch. 687, Laws of 1881, a notice requiring the owner of a hotel to erect fire escapes upon it must be issued in the name of the Fire Department of the City of New York and be subscribed by the Inspector of Buildings, and a person upon whom a notice to that effect, subscribed by the Inspector of Buildings, but not issued in the name of the Fire Department, is served is not subjected to any of the penalties provided for its disobedience.

The power of the court to order the erection of fire escapes upon a hotel, &c., depends upon the refusal or neglect of the owner to comply within the requirement of the Fire Department within a prescribed time, and when a notice from said department requiring the erection of five fire escapes has been served upon the owner and he has failed to comply with it, the court cannot, without the consent of said owner, order the erection of three fire escapes.

Appeal from an order of Special Term authorizing and directing the respondents to place upon the hotel of the appellants certain fire escapes.

A notice signed by the Inspector of Buildings of the city of New York was issued under § 2, Chap. 687, Laws of 1881, and served upon the appellants, requiring them to erect five fire escapes upon a hotel owned by them. They neglected to comply with such notice, and a motion was made by the Fire Department for an order authorizing it to erect such fire escapes upon the appellants' hotel. Upon the hearing of such motion, an affidavit of the Inspector of Buildings was read, in which it was stated that he had decided that two of the five escapes specified in the notice could be dispensed with, and that he would only ask for an order authorizing the erection of the remaining three. In that form the order was pressed and resisted and was granted against the objection and resistance of the appellants.

*Geo. W. McAdam* and *Albert Matthews*, for *appls.*

*Wm. L. Findlay*, for *respts.*

*Held*, That the powers conferred by statute upon the Fire Department of the City of New York to require by proper notice the construction of fire escapes in and upon hotels like that of the appellants are clearly constitutional and are to be exercised as other police powers and regulations under the directions of the statutes in accordance with the sound discretion of the Fire Department; and courts of

justice will not interfere with the exercise of those powers unless that exercise is so clearly improper that any intelligent mind can see the plain and manifest injustice and unreasonableness of the demand. *Fire Dept. v. Tallman*, Daily Reg., May 31, 1883; *Todd v. Fire Dept. id.*, June 19, 1883; 32 Barb., 102.

That such proceedings are not obnoxious to the objection that the party affected is deprived of his property without due process of law, nor is the right of trial by jury preserved to him therein; or unjust sense applicable thereto. 37 N. Y., 668; 70 N. Y., 530; 34 How., 147, Code of Civ. Pro., § 968.

17 How., 273, distinguished.

That these powers and duties conferred upon the Fire Department are statutory, and it must be shown in all cases that the power has been set in motion and is sought to be exercised in substantial compliance with the statute. That the notice in this case was issued under § 2, Chap. 687, Laws of 1881, which required that it should be issued in the name of the Fire Department and shall have the name of the Inspector of Buildings affixed thereto, and that, while it was subscribed by the Inspector of Buildings, it was not issued in the name of the Fire Department, and therefore the appellants were not subject to any of the consequences provided for its disobedience.

That the authority of the Special Term to make an order of the kind appealed from depended upon the

refusal or neglect of the owner of the building to comply with the requirements of the department within a prescribed time; and the notice which was served having specified five escapes, the court had no power to direct the construction of three, for as to any requirement to construct three escapes the appellants were not in default, for a refusal to do more than is necessary is not a refusal to do so much as is necessary.

Order reversed.

Opinion by *Davis, P. J.*; *Daniels, J.*, concurs.

#### NEGLIGENCE. MASTER AND SERVANT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Margaret Kennedy, admx., applt., v. The Manhattan R.R. Co., respt.*

Decided Oct. 8, 1884.

An employer is not bound to protect the person employed against such risks of injuries as are incidental to the employment itself, and are plainly to be perceived and comprehended by the employee when accepting the employment.

The plaintiff's intestate was employed by the defendant to stand upon the track of its elevated railroad and signal approaching trains and workmen engaged in excavating on the street below when blasts could be discharged. After being engaged in such employment about a month he was killed by one of defendant's trains. *Held*, No negligence on the part of defendant in failing to provide a platform outside of its tracks as a means of escape for plaintiff's intestate in addition to the means ordinarily used by persons similarly employed of stepping upon the girders connecting the tracks or of letting themselves down under the track.



Appeal from a judgment recovered on the dismissal of the complaint at the Circuit.

Plaintiff's intestate was employed by the defendant to stand upon the track of the elevated railroad and signal approaching trains and workmen engaged in excavating in the street below when blasts could be discharged. The only means of escape from passing trains provided him were those generally used by persons similarly employed, namely, stepping upon the iron girders connecting the tracks, or of letting himself down between the ties to a position below the tracks. He was engaged in this employment about a month without complaining of its risks or asking for further precautions, and, at the end of that time, he was killed by a train from which he was endeavoring to escape by stepping upon a girder. It was insisted upon the part of the plaintiff that the defendant was guilty of negligence in failing to provide a platform outside of its tracks to which he could have retreated.

*E. Ellery Anderson*, for applt.

*R. E. Deyo*, for respt.

*Held*, That while, as a general proposition, an employer is bound to use reasonable care and attention in guarding his employees against the risk of accidents, this rule has not been carried to the extent of requiring the employer to secure the protection of the person employed against such risks of injuries as are incidental to the employment itself.

That in the performance of the

services required of the intestate, and which he voluntarily undertook to render, he was subject to the risk of encountering accidents by trains approaching the place required to be occupied by him to give the signals which he was employed to communicate. That was plainly to be observed and seen by himself as well as all others whose attention might be called to the situation. His employment required him to make use of the instrumentalities as they had been located in that vicinity. It was all clearly and evidently before his eyes and within his comprehension, and he must have understood that, in the discharge of his duties, he subjected himself to the risk of just such an accident as was encountered by him; and, as that was clearly indicated by the situation and the circumstances under which he was required to act, that was one of the risks incident to his employment for an accident from which the defendant was not liable. 63 N. Y., 449; 88 N. Y., 264; 89 N. Y., 375; 100 N. S., 213.

91 N. Y., 332, and 60 N. Y., 607, distinguished.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurred.

#### MUNICIPAL CORPORATIONS. SIDEWALKS.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

*Muller, applt.*, v. *The City of Newburgh, respt.*

Decided May 1, 1884.

In case of personal injuries caused by slipping on ice formed on the street, a municipal corporation is liable only for the exercise of reasonable diligence, after the unsafe condition of the sidewalk is shown to its agents, either by actual notice or by constructive notice, as when the unsafe condition has continued long enough to become notorious.

Appeal by plaintiff from judgment.

Action for personal injuries received from the alleged neglect of defendant.

Plaintiff on Sunday, January 9, 1884, while walking on the street, slipped upon ice formed on the sidewalk, which was covered by snow falling at the time. There had been a heavy fall of snow the Thursday previous, and then it rained and afterwards froze, thereby forming ice. It was to be inferred from the testimony that the rain fell and the ice was formed soon after the snowstorm on Thursday, but it did not definitely appear when, and plaintiff testified that he walked up and down the day previous and did notice the ice.

*Held*, That the city was responsible only for the exercise of reasonable diligence after the unsafe condition of the sidewalk was shown to its officer either by actual or constructive notice, and as there was no such notice, it seems to follow there was no neglect. It cannot be said that the ice had remained so long as to become notorious or to justify the inference of notice to the city.

It is not practicable for municipal corporations to establish an incessant inspection of their

streets, and, without that, it is impossible to guard against the conditions arising from natural causes. In our climate the streets and sidewalks are icy and slippery in winter, and their condition is produced by natural causes and does not depend on any care or skill in their construction or repairation. The traveler must then beware and exercise care and caution commensurate with the increased danger.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*

#### DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Michael A. Coleman, *respt.*, v. Walter G. King, *applt.*

Decided October 8, 1884.

The measure of damages in an action for a breach of contract consisting in a failure on the part of the defendant to put plaintiff in possession of premises which he had leased from defendant is the difference between the rental value of the premises and the rent reserved by the lease.

In such an action the jury was allowed to consider as elements of damage the value of plaintiff's time employed in seeking carpenters and painters to make alterations in the premises hired of defendant, his labor performed in searching for other premises after the breach on the part of defendant, and the rent which he was obliged to pay for such other premises. *Held*, Error.

Appeal from a judgment entered upon verdict and from order denying motion for a new trial.

This action was brought to recover damages claimed to have been sustained by a failure on the

part of defendant to put plaintiff in possession of certain premises which he had leased from defendant for three years from May 1st, 1880. Upon the question of damages, the jury were allowed to consider the value of time spent by plaintiff in procuring carpenters and painters to make alterations in the premises leased from defendant, his labor in searching for other premises after the breach on the part of defendant, and the rent which he was obliged to pay for such other premises.

*William King Hall*, for applt.

*Sewell, Pierce & Sheldon*, for respt.

*Held*, Error; that the measure of damages in such actions as this is the difference between the value of the premises and the rent reserved. 4 Seld., 115; *Schwartzwalder v. Brace*, Com. Pleas, Dec., 1847; 1 Hilton, 420.

63 N. Y., 561, distinguished.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Davis, P. J.*, concurred.

*Daniels, J.*, concurred in the reversal of the judgment and the granting of a new trial with the qualification that the ruling under which it should be had should not be so stringent as should exclude the necessary expenses in obtaining other premises, including the value of plaintiff's time spent in so doing.

## VENUE. TRESPASS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Easton, applt., v. Booth, respt.*

Decided May, 1884.

An action for trespass to real estate under the provisions of Code Civ. Pro., § 982, is still local, and must be brought in the county where the real estate is situate.

Appeal by plaintiff from order changing place of trial.

The action was for trespass on real property situate in the County of New York, and the venue was laid in the County of Kings, and, by the order appealed from, changed to the County of New York.

*B. E. Valentine*, for applt.

*J. F. Hoyt*, for respt.

*Held*, That these actions are still local under the Code of Civil Procedure, as they were before. The language of Section 982 is, "Each of the following actions must be tried in the county in which the subject of the action, or some part thereof, is situated \* \* and every other action to procure a judgment establishing \* \* or otherwise affecting an estate, right, title, lien, or other interest, in real property."

Order affirmed, with costs.

Opinion by *Dykman, J.*

## REMOVAL OF REGULAR CLERKS IN CITY DEPARTMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Edward

Dickel, *applt.*, v. The Commissioners of Docks, *respts.*

Decided Oct. 8, 1884.

A notice to one of the regular clerks in the Department of Docks of the city of New York, informing him that "the board deem him incompetent for the proper and creditable performance of the duties assigned to and required of him," and appointing a day for him to appear before the board and "show cause and make such explanation as he may desire as to why he should not be removed from his position of clerk in the department," does not comply with § 48 of Chap. 410, Laws of 1883, by informing him of the cause of his proposed removal.

A general charge of "incompetency" in such a notice, without specifying the particulars in which it consists, does not comply with the said statute.

If, at the time specified in such a notice, the clerk is prevented from appearing before the board by serious illness and notifies the board of that fact before such time, but they nevertheless proceed to remove him, no opportunity for explanation is allowed him as required by said statute.

Certioari to review the action of respondents in removing the relator from office.

The relator was a regular clerk in the Department of Docks of the city of New York. On the 29th of Dec., 1883, the Board of Commissioners of Docks passed the following resolution:

*Resolved*, That notice be and is hereby given in compliance with the provisions of § 48 of Chap. 410 of the Laws of 1882, to Edward Dickel that this Board deem him incompetent for the proper and creditable performance of the duties assigned to and required of him; and that said Edward Dickel be and he hereby is notified to appear before the Board at its office on Monday the 31st inst.,

Vol. 19—No. 24.

at 1 o'clock, P. M., to show cause and make such explanation as he may desire as to why he should not be removed from said position of clerk in this department.

A copy of this resolution was served upon the relator, but before the time appointed for his appearance before the commissioners he was taken seriously ill, and was thereby prevented from so appearing. He thereupon sent a letter to the Board stating the fact of his illness, which letter was received by the Board and was in their hands before any action was taken for his removal, but, nevertheless, the relator not appearing at the time and place specified in the resolution, the Board removed him from his office.

*Rich'd J. Morrison*, for relator.

*D. J. Dean*, for respts.

*Held*, That under § 48, Chap. 410, Laws of 1882, the removal of a regular clerk in a city department must be for cause; that he must be informed of the cause of the proposed removal and be allowed an opportunity of explanation. That the cause must be some dereliction or general neglect of duty or incapacity to perform duties or some delinquency affecting his moral character and his fitness for office. The cause assigned should be personal to himself and implying an unfitness for the place, and such cause being assigned, if unexplained, the removal may be made. 72 N. Y., 445.

That in this case the cause assigned was a mere arbitrary conclusion of the Board, and the relator was allowed to explain

why the Board should not execute its arbitrary conclusion, and did not therefore comply with the said statute.

That if the charge be treated as a general one of "incompetency," the relator was entitled to have the kind and nature of his incompetency stated, and, on account of the failure of the notice in his case to do so, it did not comply with the said statute.

That upon the facts shown it was manifest that the Board acted without allowing the relator an "opportunity of making an explanation" within the true intent and meaning of the statute.

Order of removal reversed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

### HUSBAND AND WIFE. CREDITOR'S ACTION.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Elbridge A. Kingman, *applt.*, v.  
Jette Frank et al., *respts.*

Decided Oct. 8, 1884.

A judgment creditor, an execution upon whose judgment has been issued and returned unsatisfied, may maintain a creditor's action against the wife of his judgment debtor to recover a debt owing by her to him for services performed by him in her employment in her separate business.

It seems that the husband himself, or his assignee, could maintain an action against his wife to recover said debt.

Appeal from a judgment sustaining a demurrer to the complaint.

This suit was brought by the

plaintiff as a judgment creditor of the defendant, Gustave Frank, after the issuing and return of an execution against his property unsatisfied, to recover from his wife, Jette Frank, a debt of \$1040 owing by her to him for services performed by him in her employment, to manage and superintend a separate business carried on by her, at a salary of \$8.00 per week. A demurrer was interposed upon the ground that the facts did not constitute a cause of action, inasmuch as the husband himself could not enforce the payment of his salary by an action against his wife, and this demurrer was sustained by the Special Term for that reason.

*John Brooks Leavitt*, for applt.

*August Kohn*, for respts.

*Held*, That the defendant, Jette Frank, could employ her husband, as she did, to perform services for her in her separate business resulted from the statutory provision empowering her to carry it on the same as though she was an unmarried woman; and the existence of that power of employment derived from that statutory authority has already received the sanction of the courts. 60 Barb., 406; 44 N. Y., 343; 68 N. Y., 400.

That as she could enter into a lawful contract for the employment of her husband in this manner, and has been required by the statute to be considered as a *feme sole* in the exercise of the authority conferred upon her, it would seem to follow that she could obligate

and bind herself for the payment of the stipulated compensation. That it would not follow from the inability of the husband to collect the debt by means of legal proceedings, if such disability should be deemed to exist, that the plaintiff would be prevented from doing so by reason of the same disability, for this disability would extend no further than to affect the remedy, and would not stand in the way of the plaintiff to recover the debt, or of a receiver appointed for that purpose under a proper judgment of the court. That to warrant such a recovery all that would seem to be necessary is an obligation on the part of the wife to pay the money, and that obligation has been created by her contract and the performance of her husband's services under it. These facts, together with the acquisition of the demand by the plaintiff, or by a receiver in the action, would be all that could be legally required to maintain an action for the recovery of the debt.

That it seems that an assignee of the husband might in like manner recover this demand. 61 N. Y., 576.

Perkins v. Perkins, 62 Barb., 561, distinguished.

Judgment reversed and judgment directed for plaintiff on demurrer with leave to answer, &c.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

## PRACTICE.

## N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Geo. Goetting, *applt.*, v. Mathias Biehler et al., *respts.*

Decided Oct. 8, 1884.

Section 1023 of the Code of Civ. Pro., providing and directing that the court shall, at or before the time when the decision is rendered, note in the margin of a statement of proposed findings of facts and conclusions of law previously submitted to it the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement so noted, is mandatory, and no authority has been given to disregard it when the propositions may be considered not to be either important or material. When the court refuses to act upon propositions presented to it upon the ground that they are unnecessary, the General Term will send the case back to have them passed upon and noted.

Appeal from judgment recovered on trial at Special Term.

Before the decision of this action by the court, before which trial took place findings of fact and law were presented and submitted to it, and it refused to find any of them because they were considered unnecessary.

*Hyland & Zabriskie*, for *applt.*  
*D. S. Riddle*, for *respts.*

*Held*, That by § 1023 of the Code of Civ. Pro. it has been provided and directed that the court shall, at or before the time when the decision is rendered, note in the margin of the statement the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement so noted. This provision is mandatory in its lan-

guage, and no authority has been given to disregard it when the propositions may be considered not to be either important or material. The party is entitled to have each proposition of fact or law acted upon and noted, and it is only after that has been done that the materiality of either is to be regularly considered. 82 N. Y., 449. Until that has been done this appeal is not in a condition to be heard, and the case must be sent back to have the propositions submitted passed upon and noted. 80 N. Y., 636.

Ordered accordingly.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur.

#### PRACTICE. DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Daniel T. Hedges, *respt.*, v. Wm. S. Williams, *applt.*

Decided Oct. 8, 1884.

Section 910 of the Code of Civ. Pro., merely permits the court, on motion, to suppress the deposition of a witness for certain reasons, and does not require it to do so when the personal attendance of the witness can be secured, and it contemplates a special motion for that purpose, in the hearing of which all the facts may be brought before and considered by the court, and does not permit the party to proceed to the trial and then, for the first time, present the application as a legal point to be ruled upon in the course of the hearing.

A deposition taken conditionally within the State cannot be read if the personal attendance of the witness can be secured, while a deposition taken out of the State can be read under such circumstances, unless it has been suppressed by an order made for that purpose.

Appeal from judgment entered on report of a referee.

Upon the trial of this action the depositions of two witnesses who had been examined upon an open commission, out of the State, were read. To this the counsel for the defendant objected, for the reason that the witnesses themselves were personally present before the referee, and he moved that the depositions be suppressed. The referee overruled the objection and denied the application to suppress the depositions, and defendant's counsel excepted.

*Robert Sewell*, for *applt.*

*M. C. Addoms*, for *respt.*

*Held*, That § 910 of the Code of Civ. Pro. does not support the exception. It merely permits the court, on motion, to suppress the deposition of a witness for this and other causes. That it contemplates a special motion, in the hearing of which all the facts may be brought before, and considered by, the court. That this section has not been framed in such a manner as to permit the party to proceed to the trial, and then, while it is in progress, for the first time present the application as a legal point to be ruled upon in the course of the hearing.

That the section of the Code referred to does not authorize the exclusion of a deposition as evidence as long as it has not been suppressed, and whether it should be so suppressed is a matter resting in the discretion of the court, to which a motion for that purpose may be addressed. 14 Wend., 62.

That a deposition taken out of the State differs in this respect from one taken conditionally within the State. In the latter case it cannot be read if the personal attendance of the witness can be secured, while in the former it may be read unless for reasons satisfactorily shown it has been suppressed by an order made for that purpose.

Judgment affirmed.

Opinion *per curiam*.

#### PRACTICE.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Constance B. Price, *applt.*, v. Walter I. Price et al., *respts.*

Decided Oct. 8, 1884.

When a referee before whom an action was tried finds all the facts entitling the plaintiff to judgment, but, by an error of law, directs a judgment to be entered in favor of the defendant, dismissing the plaintiff's complaint, it is proper for the General Term upon the decision of an appeal to order judgment for the plaintiff upon the facts so found by the referee, and it is not necessary that a new trial should be ordered.

This was an action for dower and was tried before a referee who directed a judgment to be entered dismissing the plaintiff's complaint. Upon an appeal from such judgment the General Term decided that upon the facts found by the referee the plaintiff was entitled to dower and directed the entry of judgment to that effect. The defendants thereupon made a motion that a new trial be ordered in place of such judgment.

*Wm. Peet*, for *respts.*

*Chas Jones, Geo. H. Starr and Thos. Hooker*, for *appls.*

*Held*, That it was regular to direct judgment for the plaintiff for the reason that the referee had found all the facts entitling her to recover dower, and no fact inconsistent with that right in any respect has been found by him. That his only error was the decision that she was not entitled to dower upon the facts so found to have been proved and the direction that her complaint should be dismissed, and the purpose and object of the decision was to correct that error. That it was a misconstruction of the effect of the facts proved, and the direction should have been for judgment in plaintiff's favor. That nothing consequently appeared to remain for any further trial. That the trial was complete in all respects. That the entire foundation of the action was found to be favorable to plaintiffs, and no further advantage could be gained by another trial. That the case presented is the same as it would be upon a special verdict finding all the facts proved by the evidence. That is what the referee had done by his report, and all that remained was to direct judgment for the relief awarded by the law upon that state of facts. That to do so was no more than a modification of the judgment by which it was changed from judgment in favor of one party to a judgment in favor of the other, and that modification the Court has been authorized to make. That unlimited power of



modification has been given by § 1317 of the Code of Civ. Pro., and it should be applied in such a case as this.

Motion denied.

Opinion by *Daniels, J.; Davis, P. J., and Brady, J.,* concur.

### STATUTE OF FRAUDS. TRUSTS.

#### N. Y. COURT OF APPEALS.

Wood, *applt.*, v. Rabe, *exr.*, et al., *respts.*

Decided Oct. 7, 1884.

The real estate of plaintiff having been sold on execution and the time for redemption by him having expired, he was induced to confess judgment to his mother so that she could redeem for his benefit, she promising to convey to him on his paying said judgment. This she afterwards refused to do. *Held*, That the agreement was not one for a sale of lands within the Statute of Frauds, but created an executory trust which could be enforced in equity.

This action was brought to enforce an oral agreement between plaintiff and defendant's testatrix, his mother, in respect to certain real estate in the city of New York. Under the will of plaintiff's maternal grandfather, who died prior to 1854, he was seized of a vested estate in remainder in the undivided eighth part of said real estate, dependent upon the life estate of his mother. On February 23, 1854, two judgments by confession were entered against plaintiff in favor of one S., his brother-in-law, one for \$723.33 and the other for \$362.61. Execution was issued on the first Sept. 25, 1854, and by virtue there-

of on Nov. 18, 1854, the sheriff sold all plaintiff's interest in said premises to S., and on the same day delivered to him a certificate which stated he would be entitled to a deed Feb. 18, 1856. Plaintiff's time to redeem expired Nov. 18, 1855. He did not know that his interest in the land had been sold until Nov. 27, 1855. The information came through B., who had been plaintiff's guardian, and who had acted as attorney for his mother, and he having casually heard of the sale communicated the fact to plaintiff's mother and informed her that the time for redemption by plaintiff had passed. B., on being informed that plaintiff had borrowed money of his mother, advised her to procure a confession of judgment, so that she might redeem the property and S. should not have it. Plaintiff was requested by his mother to meet her at B's office. They met, and he was urged by B. and his mother to confess judgment in her favor for \$2,000, the amount of her loan, so as to enable her to redeem for his benefit. Plaintiff first insisted that he had received the \$2,000 from his mother as a gift and not as a loan. His mother denied this, and after much urging he finally confessed judgment in his mother's favor for \$2,000, for money received by him prior to Nov. 14, 1855. Plaintiff testified that his mother represented she wished to redeem the property for his benefit and would convey to him on his paying her the amount of the judgment,

\$2,000, and interest; B. confirmed this testimony. Plaintiff's mother was examined. She was an old lady and her memory of the transaction was indistinct, but she did not deny the testimony of plaintiff and B. On Dec. 22, 1855, plaintiff's mother redeemed under her judgment and received a certificate from the sheriff, and on Feb. 18, 1856, received a sheriff's deed. On Feb. 16, 1856, she paid S. the amount of his other judgment and interest. Plaintiff's interest in the property, at that time, was found to be at least \$10,000, and there were no liens thereon except the two judgments belonging to S. and the one confessed by plaintiff to his mother, amounting, in all, to about \$3,200. It was also found that in December, 1859, plaintiff tendered to his mother the aggregate of the three judgments with interest, and demanded a judgment pursuant to the agreement. She refused the tender and declined to convey. Unfriendly relations then existed between plaintiff and his mother. At the date of the agreement plaintiff was twenty years of age. This action was commenced in 1862.

*Robert E. Deyo*, for applt.

*Rudolph F. Rabe*, for respts.

*Held*, that the agreement proved was not, in any ordinary sense, an agreement for the sale of land, but an executory contract by the plaintiff to confess judgment, and by his mother to acquire title to land by redemption under the statute, and to hold it in the trust to convey to plaintiff upon the

condition stated, and it created, so far as the words and the essential nature of the transaction could, an executory trust for plaintiff's benefit.

This agreement was founded on a good and sufficient consideration, 93 N. Y., 255; 32 Mich., 313; that, considering the confidential relations existing and the circumstances, the agreement could be enforced in equity, and the Statute of Frauds could not be set up as a bar. 2 Atk., 160, 254; 34 N. Y., 307; *Perry on Trusts*, § 226.

Where a trust is sought to be established from the violation of an oral agreement purporting to create a trust, and a court of equity upholds the trust and enforces specific performance, the trust is not an implied or constructive trust within the exception in the Statute of Frauds. 2 Vern., 294. In granting relief in any such case the Court proceeds upon the ground of fraud, actual or constructive, and enforces the agreement by reason of the special circumstances.

A court of equity will not permit the Statute of Frauds to be used as an instrument of fraud.

When a person, through the influence of a confidential relation, acquires title to property, or obtains an advantage which he cannot conscientiously retain, the Court, to prevent the abuse of confidence, will grant relief. 1 S. & L., 433; 4 E. & I. Apps., 82.

It seems that the fraud upon which the Court acts in such cases must be something more than that which in a moral sense arises from

a mere breach of an oral agreement. 45 N. Y., 589; 66 id., 229.

The rule governing dealings between persons standing in fiduciary relations is applicable to parent and child. 7 Beav. 551; 15 id., 278; 8 De G., M. & G., 933.

Judgment of General Term, affirming judgment for defendants, reversed and new trial ordered.

Opinion by *Andrews, J.* All concur.

### INSURANCE. AGENCY. PRACTICE.

#### N. Y. COURT OF APPEALS.

Hepburn, recr., *applt.*, v. Montgomery et al., *respts.*

Decided Oct. 7, 1884.

The agreement of an insurance company to pay commissions to agents on renewals is conditioned upon its continued existence and ability to renew policies and receive premiums thereon and is terminated by its dissolution. Thereafter no commissions can become due to an agent nor can he commute for a gross sum to become due.

An exception to "each of the conclusions of law" in a finding by a referee is too general to be availing.

See S. C., 19 W. Dig., 26.

These were appeals in three cases from orders and judgments of the General Term, affirming judgments on reports of a referee in favor of defendants.

Action No. one was brought to foreclose a bond and mortgage for \$10,000 executed by defendants to the Continental Life Insurance Co., of which plaintiff is the receiver. The defendants set up usury and, as an offset to any sum which might be found due on the

mortgage, \$16,646 as a sum due defendant M. from the Insurance Co. by his electing to receive that sum in commutation of all commissions due or to become due him as general agent of the company on premiums on policies which he might have collected if the company had not failed.

Action No. two was also brought for the foreclosure of a mortgage and the same counterclaim was pleaded.

*Jno. C. Keeler*, for applt.

*John M. Dunning*, for respts.

*Held*, That the counterclaims pleaded were not good. 91 N. Y., 174; 93 id., 630.

The agreement of the company to pay commissions on renewals was impliedly conditioned upon its continued existence and ability to renew policies and receive premiums thereon, and was terminated by its dissolution, the right and power of the company to receive premiums having been destroyed by the lawful action of the officers of the State. No commissions on such premiums could thereafter become due to the defendant M., and his right to elect to commute for a gross sum for commissions to become due was terminated.

Action No. three was brought against M. alone to recover a balance due the company for moneys received by him as its agent and not paid over. The only exception in that case was "to each of the conclusions of law filed \* \* \* and contained in the report of the referee \* \* \* and marked "Third." The finding marked

"Third" does not distinguish between matters of fact and matters of law but embraces both.

*Held*, That the exception is too general to be available. 87 N. Y., 550.

Judgment of General Term, affirming judgment for defendants on report of referee in actions Nos. one and two, reversed and new trial ordered, and in action No. 3 affirmed.

*Per curiam* opinion. All concur.

## COMMON CARRIER.

### RELEASE.

N. Y. COURT OF APPEALS.

Wilson, *applt.*, v. The N. Y. C. & H. R. RR. Co., *respt.*

Decided Oct. 7, 1884.

A stock release which provides for the release of the carrier from all liability for injuries which the animals may receive in consequence of the negligence of the carrier's servants, or in consequence of insecurity of cars, exempts the carrier from liability for injury to the animals in consequence of a defective door in the car in which they are transported.

Affirming, S. C., 15 W. Dig., 7.

This action was brought to recover damages for injuries to a horse, resulting from negligence of the defendant in its transportation. It was proved that the door of the car in which the animal was carried was out of repair and unsafe when used to confine and protect live stock, and that plaintiff's horse was injured thereby. The car was an iron grain car, and was subsequently used to carry lum-

ber, and passed by an inspector as suitable and sufficient for that purpose. The contract under which the horse was shipped released defendant from "all liabilities for injuries which the animals or either of them may receive in consequence of any of them being wild, vicious, unruly, weak, escaping or maiming themselves or each other; or in consequence of heat, suffocation, or other ill effects of being crowded either upon cars or in yards, or on account of being injured by the burning of hay, straw, or any other material used for feeding the stock; or in any other way, including the negligence of said company's servants; and also for all loss or damage which may be sustained by reason of any delay in the loading, transportation or delivery of them, or in consequence of insecurity of the cars." It was not shown or alleged that the company did not furnish a sufficient number of safe and suitable cars for the transportation of horses, or that such cars were not at hand and ready to be used when the shipment was made.

*John W. Stone*, for *applt.*

*D. M. K. Johnson*, for *respt.*

*Held*, That plaintiff was not entitled to recover; that as the causes of injury specifically mentioned are such as could only occur during the process of the shipment and transportation, and the negligence of defendant's servants included in the recital naturally refers and is limited to a negligence occurring in the same process, if injury arose from a

careless selection of an insecure car by the servants making up the train when safe cars were provided by the company, or from any other negligence of such servants during the process of transportation, the company is freed from liability. The company was guilty only of a breach of contract to carry safely, and from that it was released by the provision of the contract releasing it from responsibility for any injury arising "from the insecurity of the cars." 89 N. Y. 370.

Judgment of General Term, affirming judgment for defendant on report of referee, affirmed.

Opinion by *Finch, J.* All concur, except *Danforth, J.*, absent.

## APPEAL. LUNATICS.

### N. Y. COURT OF APPEALS.

The Agricultural Ins. Co., *applt.*, v. Barnard, *implyd.*, *respt.*

Decided Oct. 7, 1884.

Where the appeal book contains only the judgment roll and exceptions to the findings of law of the court, the appellant, to succeed, must show that the trial court could not, in any view of the facts found, properly order a judgment for the other party.

The mortgage in suit was executed by the committee of a lunatic, in pursuance of an order of the court authorizing its execution for the purpose of paying a claim by an insane asylum for the support of the lunatic, to recover which an action had been commenced. The petition for such order showed all the facts necessary to confer jurisdiction. *Held*, That the court would not presume, for the purpose of subverting the order, that other debts existed which were not provided for; that the claim of the asylum constituted a valid debt against

the lunatic, which could be enforced against his property independent of any action of his committee; that its existence constituted a sufficient ground for the application for leave to mortgage this real estate, and the filing of a petition showing its existence vested the court with jurisdiction.

This action was brought to foreclose a mortgage executed by one T., as committee for one B., a lunatic. The record does not contain the evidence taken on the trial, and the appeal to the General Term, from a report in favor of the plaintiff, was heard and determined solely upon the judgment roll and exceptions to the findings of law by the trial court.

*A. H. Sawyer*, for *applt.*

*E. C. James*, for *respt.*

*Held*, That to succeed in his appeal it was incumbent on defendant to show that the trial court could not, in any view of the facts found, properly order a judgment for plaintiff.

The findings show that the mortgage was given in pursuance of an order obtained from the Supreme Court, authorizing its execution for the purpose of paying the amount due the Utica Insane Asylum for the maintenance and support of the lunatic during a precedent period of time. The lunatic had been put in the asylum by his committee, but no express contract was shown to have been made between the committee and the asylum for the lunatic's support. It appeared that an action had been commenced by the asylum to recover for the lunatic's support.

The proceedings by which the committee was appointed were

regularly taken. No bond was given by him on making the application for leave to execute the mortgage in question. The matter was referred to a referee, and notice of the hearing was mailed to the lunatic and his children at their respective residences, and the referee reported in favor of the execution of the mortgage. There was no evidence that there were other debts of the lunatic unpaid which were not provided for by the order. The findings showed that all the facts necessary to give jurisdiction were stated in the petition.

*Held*, That the court could not presume, for the purpose of subverting the order, that other debts existed, or that the petition failed to show facts necessary to give the court jurisdiction to make the order in question, and as the findings show that all the facts necessary to confer jurisdiction were stated in the petition the order was valid and authorized the execution of the mortgage.

The sum claimed by the asylum constituted a valid debt against the lunatic at the time the proceedings were taken, which could be enforced against his property independently of any action of the committee. 2 Johns. Ch., 400. The existence of the debt constituted a sufficient ground, under Section 17, Title 2, of Chapter 446 of Laws of 1874, for the application to the court for leave to lease, mortgage and sell his real estate, and the filing of a petition showing the existence of such a debt vests the court with jurisdic-

tion which would not be divested by subsequent irregularities in the proceedings, unless they were taken in violation of some express provision of the statute. 18 N. Y., 592; 8 Abb. Pr., 59; 48 N. Y., 50, 1 Hill, 154; 2 id., 625; 101 U. S., 418. The Supreme Court, having general jurisdiction over the subject matter of the application, had the authority to proceed and make such an order in the premises as the statute authorized, however the facts may have been brought to its knowledge, and the recital in the order of the facts necessary to give the court jurisdiction is *prima facie*, and if not affirmatively disproved conclusive evidence of their existence. 94 N. Y., 31. The committee acts as the officer of the court, and is subject to its control and direction. 5 Paige, 120; 101 U. S., 417.

Order of General Term, reversing judgment for plaintiff, reversed, and judgment affirmed, with costs.

Opinion by *Ruger, Ch J.* All concur.

## CONTRACT.

### N. Y. COURT OF APPEALS.

Beckwith et al., *respts.*, v. Brackett et al., *appls.*

Decided Oct. 7, 1884.

Defendants, being guarantors for the return of certain bonds to plaintiffs and being about to be sued on their guaranty, agreed with plaintiffs that if the latter would bring action against their principal and procure judgment, they, defendants, would take assignment thereof and return the bonds and pay the costs and expenses of the suit.

*Held*, That such agreement was a valid, original agreement and was not within the Statute of Frauds.

In December, 1868, defendants guaranteed in writing the return to plaintiffs of \$4,000 of U. S. bonds, loaned by plaintiffs at the same time to the Rochester Iron Manufacturing Co. In November, 1877, the bonds not having been returned by the company to plaintiffs, and defendants having been informed by plaintiffs that they intended to sue them or their guaranty, a meeting took place by appointment between one of the plaintiffs and the defendants, at which they verbally undertook and agreed with plaintiffs that if they would bring an action against the company for said bonds and prosecute the same to judgment, the defendants would, on the recovery of such judgment, take an assignment thereof from plaintiffs and immediately return to them said bonds and pay the costs and expenses of the suit. The plaintiffs, in pursuance of that agreement and on the same day it was made, brought their action against the company as proposed, and with due diligence recovered and perfected judgment therein for \$4,381.32 damages, and \$28.12 costs, on January 15, 1878, and on the next day tendered to defendants a written assignment of the judgment and demanded of them the return of the bonds and payment of the costs of the suit, which demand was refused. This action was then brought upon defendants' agreement with plaintiffs.

*Wm. H. Bowman*, for appls.

*S. D. Bentley*, for respts.

*Held*, That the agreement upon which this action was brought was a valid, original, special undertaking, entered into by defendants for the purpose of discharging their own obligation, and was supported by a sufficient consideration and was not within the statute of frauds.

*Also held*, That the agreement was not a sale of the bonds or of the judgment.

Judgment of General Term, affirming judgment for plaintiffs on report of referee affirmed.

Opinion by *Rapallo, J.* All concur.

#### WILLS. BEQUESTS TO RELIGIOUS, &c., CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Chas. J. Harris et al., exrs., &c., *respts.*, v. The American Baptist Home Missionary Society et al., *appls.*

Decided Oct. 8, 1884.

Bequests to religious corporations, created under the Act of 1813, are not included within Chap. 319 of the Laws of 1848, invalidating bequests to benevolent, charitable, scientific and missionary societies when the will is made within two months of the testator's decease.

The Legislature, by amending the act incorporating The American Baptist Missionary Society by eliminating from it a provision subjecting it to the Statute of 1848 (*supra*), and substituting in its place a provision, subjecting to Chap. 360, Laws of 1860, relieved this society from the restrictive operation of the provisions of the Act of 1848.

Appeal from judgment of Special Term adjudging invalid, under

Chap. 319, Laws of 1848, because contained in a will made less than two months prior to the testator's death, bequests to the following institutions:

The American Baptist Home Missionary Society, The American Baptist Missionary Union, The Baptist Home for the Aged in the City of N. Y., and The Board of Trustees of the Tabernacle Baptist Church of the City of N. Y.

*John H. Deane* and *S. P. Nash*, for The Tabernacle Baptist Church.

*Cephas Brainerd*, for other appls.

*Homer Nelson*, for respts.

*Held*, That the Tabernacle Baptist Church was a religious corporation formed under the Act of 1813 and its several amendments, and is entirely different from the "benevolent, charitable, scientific and missionary societies" referred to in Chap. 319 of the Laws of 1848. That by Chap. 79, Laws of 1875, religious corporations created under the Act of 1813 were subjected to Chap. 360 of the Laws of 1860, providing that no person having a husband, wife, child or parent living should bequeath more than half his estate to benevolent and religious purposes, without allusion to the Act of 1848, either in general or express terms, and the Legislature, therefore, elected to subject this class of religious corporations to the Act of 1860 to the exclusion of the Act of 1848. That since the bequests contained in the will for benevolent or religious purposes did not equal one-fourth of the testator's estate, the be-

quest to the Tabernacle Baptist Church was valid.

That the Baptist Home Missionary Society was incorporated under Chap. 117, Laws of 1843. That in 1849, the Legislature amended its act of incorporation and embodied in it the restrictions and limitations contained in the Act of 1848 (*supra*). That in 1877 the Legislature further amended the act by wholly eliminating all reference to the Act of 1848, and substituting in its place a provision subjecting the corporation to Chap. 360 of the Laws of 1860. That by this amendment this society was relieved from the restrictive operation of the provisions of the Act of 1848, and subjected to the different and somewhat conflicting provisions of the Act of 1860, and that the bequest to it contained in the testator's will was, therefore, valid.

Judgment modified, by holding that the bequests to the Tabernacle Baptist Church and to the American Baptist Home Missionary Society were valid, and that they were entitled to judgment directing their payment, and as so modified affirmed.

Opinion by *Davis, P. J.*; *Brady, J.*, concurred, referring to 18 W. Dig., 544; *Daniels, J.*, concurred.

## NEGLIGENCE.

### N. Y. COURT OF APPEALS.

The Village of Port Jervis, *respt.*, v. The First National Bank of Port Jervis, *applt.*

Decided Oct. 7, 1884.



One who makes an excavation in a public street with the permission or license of the municipal authorities is not entitled to notice of an action against the corporation brought by one who has been injured by falling into such excavation; the giving of such notice is not a condition precedent to a recovery against him by the corporation, and the omission to do so only places the burden on the corporation of again litigating the actionable facts.

This action was brought to recover of defendant the amount plaintiff was compelled to pay by way of damages to one H., for injuries sustained by falling into an excavation in a sidewalk. The defendant claims the plaintiff should have been nonsuited because it omitted to notify defendant of the action brought against it by H. It was insisted that, as plaintiff had authorized defendant to make the excavation which caused the injuries for which H. recovered damages, such notice was a condition precedent to a recovery in this action. It was also claimed that a notice claimed to have been given was insufficient.

It was proved that one E. was defendant's president and a trustee of plaintiff, and also a member of a committee authorized to contract for and superintend the construction of the bank building; that he consulted with the attorney of the village in reference to the suit brought by H. against it, and was informed of the probable liability of the bank to the village in case of a recovery by H. He was a witness on that trial and directed an appeal taken from the judgment recovered against the village.

*O. P. Howell*, for applt.

*Lewis E. Carr*, for respt.

*Held*, Untenable; that the notice to defendant was sufficient, 3 N. Y., 166; 72 id., 286; 4 Paige, 120; that defendant's liability to plaintiff grows out of its affirmative act, and renders liable not only to the party injured, but also ultimately liable to any one damaged by its neglect. The liability in such a case is predicated upon the negligent character of the act which caused the injury, and the general principle of law which makes a party responsible for the consequences of his own wrongful conduct. 8 Ohio St., 359-75; Eng. C. L., 767. The liability of the author of the act which occasions the injury does not depend upon the fact of his receiving notice of the action brought by the injured party against the municipality, but rests upon his original liability to all persons who may have suffered damages from his affirmative act of negligence. 2 Black., 423. The only object of notice in such a case is to enable the corporation to avail itself of its right to impose the burden of defense upon the party ultimately liable, and to estop the author of the injury by the judgment recovered from again contesting the facts upon which such judgment depends. The omission to give notice in such case does not go to the right of action, but simply changes the burden of proof, and imposes upon the party against whom the judgment was recovered the necessity of again litigating

all of the actionable facts. 6 Hill., 324; 34 N. Y., 281; 37 id., 530.

Upon receiving a license from the body authorized to grant it to dig in a street the licensee impliedly agrees to perform the act in such a manner as to save the public from danger and the municipality from damage. 89 N. Y., 503; 18 id., 84; 8 Hun, 571; 58 Eng. C. L., 123.

A notice in writing or an express notice is unnecessary; notice may be implied from a knowledge of the pendency of the action and participation in its defense. 13 Johns., 226; 12 Wend., 309; 86 N. Y., 614.

In deciding a motion for a nonsuit based upon the insufficiency of proof of notice, the court held that the evidence was sufficient to entitle the plaintiff to go to the jury. Defendant never after that asked to go to the jury on that question.

*Held*, That he cannot now claim that the question of fact involved should have been submitted to the jury; he should have so requested the Court. 82 N. Y., 443.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

## LIFE INSURANCE.

### N. Y. COURT OF APPEALS.

*Murray, applt., v. The New York Life Ins. Co., respl.*

Decided Oct. 7, 1884.

The policies in suit provided that they should be void if the assured "should die in, or in consequence of the violation of the laws of any nation, State or province." The assured, with his brother, made a violent assault upon one B., and, after the latter had drawn a pistol, endeavored to escape, when he was shot and killed by B., who testified that the shooting was not done intentionally.

*Held*, That a sufficient relation between the act causing the death and the violation of law existed to avoid the policy; that a death within the meaning of the policy might occur without being intentionally inflicted, and that the case was not one in which a special verdict was required.

Affirming S. C., 18 W. Dig., 252

This action was upon two policies of insurance issued by defendant upon the life of W. M., plaintiff's husband. Each contained a clause that if the insured "shall die in, or in consequence of, a duel, or of the violation of the laws of any nation, State or province," the policy shall be void. The insured died from a shot from a pistol in the hands of one B., on whom he and his brother S. M. had committed a violent assault. W. M. and S. M. had planned the assault on B., and stationed themselves in the waiting-room of a depot to await his arrival, and when B. entered the room S. M. seized him by the arms from behind, and held him while W. M., standing in front, beat him over the head and face with a raw hide, inflicting blows from which the blood flowed profusely. The assault, so far as appeared, was without provocation. B. testified that in struggling to escape from S. M. his hand was involuntarily brought in contact with a pistol in his hip pocket, which he drew. It appeared that W. M. seeing the

pistol started to escape, keeping his face towards B., and calling on S. M. to "hold him and not to let him shoot." W. M. jumped over the lunch counter, and as he was passing through a door into another room, the pistol in the hands of B. was discharged, hitting W. M. in the forehead, causing his death. B. swore that the firing was accidental, and was caused by the sudden jerking of his arm by S. M., who was holding him; that W. M. while retreating had a pistol, which he pointed at B. as if aiming at him. The witnesses differed as to the time that elapsed between the beginning of the affray and the firing of the pistol, the highest estimate being thirty seconds.

A verdict was rendered for defendant.

*A. S. Murray, Jr.*, for applt.

*Joseph H. Choate*, for respnt.

*Held*, No error; that a sufficient relation between the act causing the death and the violation of law existed within the meaning of the proviso in the policy to avoid the policy. 45 N. Y., 422. The insured must be assumed to have known the danger he incurred, and that a party resisting an assault under the circumstances, and whose anger is naturally excited, does not mark with exactness the time which separates lawful defense from excessive and unjustifiable force. The proviso in the policy exempts the company from all risks of life which attend the violation of law, which are the natural and reasonable concomitants of the transaction. A death may oc-

cur within the meaning of the policy, although not intentionally inflicted, and although it was not occasioned by the act of another.

If such a relation exists between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law, it is enough to bring the case within the condition of the policy.

If the deceased had abandoned the affray before he was shot, that would not help this case, as he was a party to the original encounter.

In submitting the case to the jury the Court requested them to specifically answer three questions—1st, Did Berdell fire the shot which killed Murray intentionally? 2nd, Was the killing of Murray justified on the ground that it was done by Berdell for his lawful self-defense? 3rd, At the time Murray was shot had he abandoned the combat? The judge stated that he did not consider these questions necessary to a verdict. The jury rendered a general verdict for defendant, accompanied with a statement that they were unable to answer the questions submitted. Plaintiff's counsel objected to receiving the verdict until the questions submitted were passed upon, but the objection was overruled.

*Held*, No error; that the case was not one in which a special verdict was required. Code, § 1187.

It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evi-

dence. If the conclusion may be justified upon either of two interpretations of the evidence the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and a part upon the other.

*Ebersole v. No. Central RR. Co.*, 23 Hun., 114., distinguished.

Judgment of General Term, affirming judgment on verdict for defendant, affirmed.

Opinion by *Andrews, J.* All concur, except *Danforth, J.*, absent.

#### ASSESSMENT. COMMISSION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. James R. Jessup v. John Kelly et al.

Decided Oct. 8, 1884.

The intention of Chap. 550 of the Laws of 1880 providing for a commission for the purpose of reviewing certain assessments made in the city of New York for local improvements was to leave the question whether substantial injustice had or had not been done in a given case to this special tribunal as one of fact to be finally determined by it, and in case it was found that such injustice had been done to clothe it with power to award such relief as under the circumstances it should judge upon the evidence presented to be just and equitable, and the power of the court to review its decision by certiorari should be exercised with the greatest caution and be restricted to cases of clear excess of jurisdiction or gross abuse and injustice. Although the authority of this commission is a judicial one in its nature it is of such a character as to leave the commissioners from the technical rules of a court of law and clothe them with the amplest powers to do in each case whatever they think to be just and equitable on the evidence presented.

Vol. 19—No. 24b.

Certiorari to review a decision of the Assessment Commission.

The defendants were appointed commissioners under Chap. 550 of the Laws of 1880 for the purpose of reviewing certain assessments made in the city of New York for local improvements, and in this case they found that a small item for injury to gas mains in constructing a sewer had been included in the assessment. The Court of Appeals had decided that such an item was not properly included in an assessment and it was insisted that the fact that the item was in strictness an illegal one required the commissioners as an absolute matter of right to order its deduction from the relator's assessment.

*John C. Shaw*, for relator.

*J. A. Beall*, for respts.

*Held*, That the intention of the Act of 1880 was to leave the question whether substantial injustice had or had not been done in a given case to this special tribunal created by it, as one of fact to be ultimately determined by the commissioners, and in case they found that such injustice had been done, to clothe them with power to award such relief as under the circumstances they should adjudge upon the evidence presented to be just and equitable, and the power possessed by this court of reviewing their action by certiorari should be exercised with the greatest caution and be restricted to cases of clear excess of jurisdiction or gross abuse and injustice.

That the commissioners were

not obliged to reduce the assessment because it included a small item adjudged to be illegal. That they do not sit as a court of law, and although their authority is a judicial one in its nature still it is of such a character as to relieve them from the technical rules applicable to a court of law and clothe them with the amplest power to do in each case whatever they think to be just and equitable on the evidence presented. That they have a right, therefore, to apply the maxim *de minimis non curat lex* even to cases where a court of law could not.

That it was adjudged by the commissioners in this case that it was not just and equitable for the relator after his rights to relief in a court had been lost by a lapse of time, to escape, by the trifling reduction asked for, the payment of interest on his assessment during the long series of years he had remained inactive, and the court did not feel called upon to interfere with such decision.

Writ quashed.

Opinion by *Davis, P. J.*; *Daniels* and *Brady, JJ.*, concurred.

## CORPORATIONS. RECEIVERS

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In the matter of the application of John Tiebout.

Decided Oct. 8, 1884.

The authority of the Court to compel a receiver of the assets of a corporation to allow a creditor of such corporation to make extracts from the corporation books does

not rest on the technical rights of a stockholder or creditor, as between himself and the corporation, under the statutes relating to corporations, but upon grounds of justice and equity in administering the trust in the hands of the receiver, and the granting or refusing an application for that purpose is within the discretion of the Court.

✓ Appeal from an order denying the application of John Tiebout, as a creditor of the Goodwillie Wyman Company, from an order directing the receiver of the said corporation to permit the applicant to make extracts from the corporation books.

*Winthrop Parker*, for applt.

*Thomas Darlington*, for resp't.

. *Held*, That the authority of the Court in such a case does not rest upon the technical rights of stockholders or creditors, as between themselves and the corporation, under the statutes relating to corporations, but upon grounds of justice and equity in administering the trust in the hands of the receiver, and that the application was addressed to the sound discretion of the Court in the exercise of its power over the books and papers of a corporation in the hands of its receiver and therefore in law in the hands of the Court, and that the application depended upon very different principles from those which would prevail if the books were in the hands of the company.

That the matter therefore was one for the exercise of discretion, and that it was neither judicious nor equitable to refuse to any party in interest an opportunity to examine and take extracts from books held by a receiver under such circumstances.

Order reversed and motion granted.

Opinion by *Davis, P. J.*, and *Brady, J.*; *Daniels, J.*, dissented upon the ground that the right of the appellant to take extracts from the books of the corporation depended upon § 25 of Chapter 40 of the Laws of 1848, securing that right to creditors of corporations incorporated under that act, and that there was no proof that the corporation in question was so incorporated.

#### TAXATION. UNEXPENDED BALANCES OF APPROPRIATIONS.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

John H. Bird, *respt.*, v. The Mayor, &c., *appls.*

Decided Oct. 8, 1884.

By § 189 of the Consolidation Act of 1892, it is made the duty of the Board of Estimate and Apportionment of the City of New York, between the 1st of August and 1st of November, to make a provisional estimate of the amount to be expended by the city government during the following year, and to appropriate certain amounts thereof to the use of the various departments, and by § 207 of said act the said Board is given power to transfer the unexpended balance of any appropriation which may have proved excessive to supply any deficiency which may have arisen by reason of some other appropriations having proved insufficient, but such Board has no power to apply such unexpended balances to any purpose for which an appropriation has not previously been made pursuant to § 189 of said act.

The act providing for the appointment of Commissioners of Accounts in the City of New York contains no provision empowering such commissioners to appoint or em-

ploy clerks at the expense of the city, and the fact that their duties are such as require clerical aid does not give them that power by necessary implication.

Neither office, nor officer, nor title to salary or pay out of the public funds, can exist or arise by implication of facts, without the express enactment of law.

Appeal from order of the Special Term continuing injunction order.

This action was brought by plaintiff as a citizen, resident and taxpayer of the City of New York, under § 1925 of the Code of Civ. Pro., to prevent waste of the funds of the city. It was charged, in substance, that the Board of Estimate and Apportionment, assuming to act under § 207 of the Consolidation Act, had unlawfully directed the transfer of, and the defendants were about to transfer certain unexpended balances of, the appropriations of former years for other purposes to the credit of the Commissioners of Accounts for clerk hire and contingencies. It appeared that no appropriation for those purposes had been made for the year 1884 by the said Board, pursuant to § 189 of the said act, and for that reason the transfer proposed was restrained by the injunction order. It was claimed by the defendants that the terminal words of § 207 of the Consolidation Act, conferring power upon the Board of Estimate and Apportionment "to transfer any appropriation which may be found to be in excess of the amount required for the purposes or objects thereof to such other purposes or objects for which the appropriations are insufficient to such as may require

*the same,*" authorized the transfer restrained.

*D. J. Dean*, for appls.

*Chas. E. Miller*, for respts.

*Held*, That § 189 of the Consolidation Act, provides that the Board of Estimate and Apportionment must, annually, between the 1st of August and the 1st of November, make a provisional estimate, by a unanimous vote, of the amount to be expended during the next following year, and that after the taking of certain steps enumerated such apportionment should become *final* in its items of appropriations, and it is out of all reason to suppose that if the list of appropriations does not contain an item for a certain purpose when it becomes final under the law, an appropriation for that purpose can be created by a majority vote of the Board, under the form and pretext of transferring unexpended balances under § 207 of the act, for to allow this would be to strike down the safeguard of unanimity which the law requires before an appropriation can be made.

That § 47 of the Consolidation Act provides that the gross sum of expenditures cannot exceed the gross sum of appropriations, and that § 207 provides for the contingency of the appropriation made for one department proving to be in excess of the amount actually required, while that made for some other purpose or object might turn out to be insufficient, by empowering the Board to transfer the ascertained excess, or so much as might be necessary to meet the ascertained deficiency, and the

terminal words of said section, "or such as may require the same," have reference to the preceding words, "to such other purposes or objects for which the appropriations are insufficient," and the phrase is to be understood as though it read "or such of them as may require the same."

That the power to transfer excesses is confined to and can only be exercised in cases where appropriations actually made have proved deficient, and that the Board has no authority to use excesses for new objects or purposes for which appropriations have not previously been made.

That moreover no power existed to appropriate moneys to pay salaries to clerks of the Commissioners of Accounts, because there is no authority of law for the appointment or employment of such clerks at the public expense. That the act providing for the appointment of such commissioners contained no provision empowering them to appoint or employ clerks at the expense of the city, and the fact that their duties are such as require clerical aid does not give them that power by necessary implication, for the only escape from the danger, and certainly of the rise, of "a multitude of new offices" and "swarms of officers to harrass our people and eat out their substance," is to hold, as a fundamental maxim, that neither office nor officer, nor title to salary or pay out of the public funds, can exist or arise by implication of facts without the express enactment of law.

Order continuing injunction affirmed.

Opinion by *Davis, P. J.*; *Daniels, J.*, concurred.

# PATENTS. PARTNERSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Wm. H. Burr, *respt.*, v. John C. de La Vergne, *applt.*

Decided Oct. 8, 1884.

A verbal contract to pay the expenses incurred in prosecuting certain experiments to test the utility of an invention in consideration of receiving an interest in the results obtained by said experiments entitles the person paying such expenses to an interest in a patent obtained for the invention, and it is not invalid as violating § 4898 of the R. S. of the U. S., requiring an assignment of an interest in a patent to be in writing.

If a partnership enters into such an agreement and pays the expenses of the experiments, and subsequently one of the partners and the inventor take out a patent for the invention in their joint names to the exclusion of the other partner, the partners so excluded can maintain an action against his copartner to compel him to put the title to such patent in the joint names of the copartners, or if the copartnership have terminated, to compel him to assign to his partner the interest to which the latter may be entitled.

Appeal from a judgment rendered at the Special Term.

The plaintiff and defendant were copartners in the business of brewing beer, and as such copartners entered into a verbal agreement with one M. to pay all the expenses incurred by said M. in conducting certain experiments to test the utility of a certain invention of his for cooling beer without the use of ice, in consideration of receiving an

equal interest in the results of such experiments. Under this agreement, such expenses were paid by the copartnership, but the defendant, without the knowledge or consent of the plaintiff, took out a patent for the invention in his own name and that of M. to the exclusion of plaintiff, who thereupon brought this action to have it adjudged that he was entitled to an interest in said patent and to compel the defendant to assign such interest to him. It was claimed by the defendant that the agreement upon which the action was founded, was void as against § 4898 of the R. S. of the U. S., requiring assignments of patents to be in writing, and also that the action could not be maintained, for if the firm were entitled to an interest in the patent, the claim must be asserted in an action for an accounting, asking for a dissolution and winding up of the firm's affairs.

*Daniel G. Wild* and *Sidney S. Harris*, for *applt.*

*Oscar Frisbie* and *E. N. Dickerson*, for *respt.*

*Held*, That the Statute of the U. S., *supra*, had no application; the case and the agreement in question was not void thereunder, because when the said agreement was made there were no patents in existence, and the statute referred to applies only to patents in existence, and not to such agreements as that involved in this case.

That the view that as the plaintiff's claim rests upon a partnership interest, this action cannot be maintained, cannot be sustained,



for the reason that the object of the action was to compel the defendant to share with the plaintiff the property which he had surreptitiously or illegally taken in his own name to the detriment of the partnership relations and with the intention of appropriating it, with all its advantages, to himself, insisting that it belonged to him personally, and under such circumstances an action can be maintained by one partner to compel the other to do equity and put the property thus acquired in the joint names of the co-partners, or if the partnership have terminated to compel him to assign to his partner the interest to which he may be entitled.

Judgment affirmed.

Opinion *per curiam*.

#### N. Y. CITY. BOARD OF EXCISE.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James Gregory, *applt.*, v. The Mayor, &c., *respt.*

Decided Oct. 8, 1884.

An action cannot be maintained against the city of New York upon a debt incurred by the Board of Excise of that city for the salary of an inspector employed by it unless the creditor has obtained from said Board its requisition on the special fund in the hands of the Comptroller to be paid out upon its requisition and payment of the same has been refused, or unless said Board unreasonably refuses to draw such requisition.

If the refusal of the Board to draw such requisition is not unreasonable the remedy of the creditor is by mandamus to compel it to do so.

Appeal from a judgment rendered at Circuit dismissing plaintiff's complaint.

In 1876 the plaintiff was employed by the Board of Excise Commissioners of the city of New York as an inspector and performed the duties of that office up to December 1, 1880, on which date he was suspended from such office without pay by resolution of the Board. He did not recognize the right of the Board to make such suspension and continued to tender his services and demand his pay until September 1, 1881, and then having demanded from the Board its requisition upon the Comptroller upon which he might receive his salary out of the funds in his hands and such requisition having been refused, although there were funds in the hands of the Comptroller applicable to its payment, he brought this action to recover his salary for the period above stated.

Upon the trial, after the above facts had been proved by the plaintiff, a motion was made for a dismissal of the complaint upon the ground that his quarrel was with the Board of Excise on account of its refusal to draw its requisition upon the Comptroller and that until he had obtained such requisition he had no cause of action against the city. This motion was granted and the plaintiff appealed.

*Elliot Sandford*, for *applt.*

*D. J. Dean*, for *respt.*

*Held*, That it would be necessary for the plaintiff in this action to proceed by mandamus to compel the Excise Board to give him

the requisition demanded before he could maintain this action unless there existed some element in the case which rendered such a course unnecessary.

66 N. Y., 585, distinguished.

That if the refusal of the Board of Excise to give such requisition was unreasonable that fact would relieve him from the necessity of pursuing the course above suggested. 8 Hun, 409.

That the question of the reasonableness of such refusal was not considered but the complaint was dismissed upon the authority of 66 N. Y., 585, which was not an authority in point as shown above.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Daniels, J.*, concurred in result.

*Davis, P. J.*, dissented, holding that the case was not distinguishable from 66 N. Y., 585, that there was no liability upon the city without the required voucher, and that it was not responsible for any neglect or misconduct on the part of the Board of Excise in refusing to give the voucher, and that 8 Hun, 409, was not an authority in point.

#### AGENT. TITLE TO PERSONAL PROPERTY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Joseph S. Spinney, *respt.*, v. Francis B. Thurber et al., *appls.*

Decided Oct. 8, 1884.

When commercial correspondents, on the order of a principal, make a purchase of property, ultimately for him, but on their own credit and with their own funds, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed.

Appeal from judgment entered upon a verdict directed by the Court.

This action was brought to recover the value of certain goods claimed by plaintiffs and loaded on board a vessel, which were seized under an attachment issued in favor of the defendants against the property of the firm of H. & C., of Valparaizo. It appears that the plaintiff was a commission merchant in the city of New York, who had been employed by H. & C. to fill certain orders for them; that the nature of H. & C.'s business was to take orders from parties in South America for the purchase of goods in New York upon a commission; that the course of business was to send the orders to agents in New York, who purchased the goods and sent them to H. & C., who held them until they were paid for, and remitted the proceeds to the New York agent, plus one half the commission, and that the plaintiff, not having any funds of H. & C., purchased the goods and paid for them with his own money, and had not been paid for them at the time of shipment; that, with a trifling exception, the goods were shipped under bills of lading, making the same deliverable to himself; that the plaintiff sent such bills of lading to H. & C., endorsed to them, and so intended

at the time of taking them, but that they were to collect the money for him from the people from whom they took the orders.

Upon these facts having been proved, the Court directed a verdict for the plaintiff.

*More, Aplington & More*, for applt.

*Geo. A. Black*, for respt.

*Held*, That the only question presented for the consideration of the Court was whether the plaintiff owned the goods at the time they were seized under the attachment. That the evidence established that the plaintiff purchased the articles for shipment with the intention of retaining the title until payment was made for them by the person for whom they were purchased and for whom they were shipped. That the firm of

H. & C. were only intermediate persons or agents who had no interest in the matter except a commission, and no title whatever to the property upon the clear understanding on which the purchases and shipment were made, and according to the understanding existing in reference to the goods, their purchase and shipment. That where commercial correspondents, on the order of a principal, make a purchase of property ultimately for him, but on their own credit and with their own funds, and such a course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed. 74 N. Y., 588.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurred.

END OF VOLUME NINETEEN.

# INDEX.

## ABATEMENT.

See CORPORATIONS, 17, 18; DOWER, 1; WILLS, 9.

## ACCORD.

1. Relator was employed by defendant on a monthly salary, which was paid in full until he was discharged. Thereafter he made claim for extra work, &c., which was adjusted, and relator gave a receipt in full of all demands. In an action to recover damages for his alleged wrongful discharge, *Held*, That if he had intended to claim wages he should have included them in his claim, and is estopped from claiming that they were not covered by his receipt, and that such receipt was an accord and satisfaction.—*The People ex rel. McDonough v. The Managers of the Buffalo Asylum for the Insane*, 276.

## ADMINISTRATORS.

See EXECUTORS; GUARDIANS, 1.

## AFFIDAVIT.

See ARREST, 4, 5; ATTACHMENT, 3, 7, 9; DEPOSITIONS, 6; REPLEVIN, 1; SERVICE, 1.

## AGENCY.

1. There is no reason why an agent may not purchase property, including the subject of the agency, honestly and in good faith, of his principal.—*Whitely v. Zea*, 98.
2. Where the agent purchases of his principal for value, in good faith, before maturity, a promissory note given on the sale made by another agent to the maker of the note, evidence as to a warranty on the sale and a breach thereof is inadmissible.—*Id.*
3. Where a written instrument raises on its face a question as to the personal liability of the party signing it parol evidence is admissible to show the intention of the parties, and where it is made to appear that the party signing in fact acted for another with authority so to do and it was so understood by the parties the principal will

be charged—*Morrill v. The C. T. Segar Mfg. Co.*, 238.

4. An agent having authority to sell goods, and collect money, and make settlements, has power to receive a check to his own order in payment of a debt to his principal; and if such agent receives the money on such check the principal must credit his debtor with the amount.—*Mores v. The Society for the protection of destitute R. C. children*, 247.
5. Such an agent would not, however, have power to receive a note to his own order payable at a future date without special authority to that effect.—*Id.*
6. Plaintiff purchased certain grain for defendants' firm without disclosing who his principals were. The vendor, on discovering who they were, brought action against the firm, but discontinued it on payment of part by defendant and gave him a release from individual liability, and thereafter recovered judgment for the balance against plaintiff, who was obliged to pay the same. On a prior settlement between plaintiff and the firm the price of the grain was excepted, the firm agreeing to pay the vendor. *Held*, That plaintiff was entitled to recover the money so paid, whether he acted as agent or broker in respect to the purchase.—*Knapp v. Simon*, 250.
7. Where an agent, acting within his authority, signs a contract without disclosing his principal's name, the validity of the contract is not affected.—*Earl v. Collins*, 307.
8. The agreement of an insurance company to pay commissions to agents on renewals is conditioned upon its continued existence and ability to renew policies and receive premiums thereon and is terminated by its dissolution. Thereafter no commissions can become due to an agent nor can he commute for a gross sum to become due.—*Hepburn v. Montgomery et al.*, 560.
9. When commercial correspondents, on the order of a principal, make a purchase of property, ultimately for him, but on their own credit and with their own funds, and

such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed.—*Spinney v. Thurber et al.*, 575.

See DISCOVERY; FRAUD, 16.

#### ALIMONY.

See DIVORCE, 1, 2, 5, 8.

#### ANIMALS.

1. Evidence that plaintiffs' crops were damaged by cattle and that defendant had admitted that the cattle were his is sufficient to support a judgment against defendant for such damages.—*Barth et al. v. Stephan*, 164.
2. The owner of domestic animals is bound to keep them on his own premises, under peril of the damage they may do to the property of others.—*Id.*

#### ANTENUPTIAL AGREEMENT.

See WILLS, 27, 36.

#### APPEAL.

1. In appeals from surrogate's courts in cases commenced prior to September 1, 1880, the Court of Appeals is precluded by § 1337, Code Civ. Pro., from re-examining the conclusions of fact except where the General Term has reversed on such questions and so certifies.—*In re probate will of Cottrell*, 2.
2. The General Term reversed, without prejudice, an order directing the receiver to pay certain moneys to the petitioner. The facts relating to the fund and the claims of the parties interested therein did not clearly appear in the papers presented. *Held*, That it was within the discretion of the General Term to decree as it did and that its order is not appealable.—*In re application of Ensign v. Cuykendall*, 34.
3. An appeal will lie to the General Term from an interlocutory order overruling or sustaining a demurrer where leave to amend was given, especially where such appeal is taken before any judgment is actually entered.—*Hand v. The Board of Supervisors of Columbia Co.*, 40.
4. A case on appeal is not required or proper for the purpose of reviewing a judgment entered upon an order confirming, vacating, modifying or correcting an award of arbitrators.—*In re arbitration of Pool and Johnston*, 43.
5. The papers which should be printed upon an appeal to the General Term from such a judgment are the papers which were before the Special Term as the basis of the order authorizing the judgment.—*Id.*
6. Testator, who was a man of sound mind

and not readily influenced except through his reason, made his will, by which he made provision for his wife and relatives, and gave a large bequest to F., his attorney. F. had given instructions to one S. to draw a codicil, but by advice of S., without F.'s knowledge, the will in question was drawn instead. Some of the facts proved on probate of the will were such as might lead to contradictory inferences. *Held*, That the question involved was purely one of fact, and that the decree in favor of the will, affirmed by the General Term, was not reviewable by the Court of Appeals.—*In re probate will of Darrow*, 51.

7. Where there is no motion in the court below for a new trial on the minutes, and no appeal from an order denying the same, the only questions coming up for review are those presented by the exceptions taken on the trial.—*Schmidt v. Cowperthwaite et al.*, 63.
8. An appeal from a surrogate's decree is not in proper shape to be heard when the appeal book contains nothing purporting to be a decision of the surrogate stating separately the facts found by him and his conclusions of law.—*Waldo v. Waldo et al.*, 100.
9. An appeal from an order denying a resettlement of a prior order does not bring up for review the order proposed to be resettled. The only question such an appeal presents is whether or not the order proposed upon the motion for resettlement should be entered in place of the one already granted.—*Lippincott v. Westray*, 102.
10. Under the last clause of § 2545, it is the duty of the appellate court, on finding that incompetent evidence was admitted, or competent evidence rejected, to determine whether the error prejudiced the party against whom it was committed, and if such evidence was important and material, and if the court cannot say that notwithstanding such error the judgment is right, or entertains a reasonable doubt on the subject, a case is presented where the exceptant was necessarily prejudiced within said section.—*In re probate will of Smith*, 220.
11. Section 2588 of the Code, if applicable to appeals to the Court of Appeals in probate cases, applies only to reversals on questions of fact; it has no application to a reversal on questions of law.—*In re will of Smith*, 252.
12. Where an appeal from an interlocutory judgment is dismissed, such dismissal is not equivalent to an affirmance of the judgment; and an appeal from the final judgment will still bring up for review the interlocutory judgment.—*McAlear v. Delaney et al.*, 252.
13. An appeal from the decree of a surro-

gate is only required to be heard upon a case under § 2576 of the Code when the decree appealed from was rendered upon the trial by the surrogate of an issue of fact.—*In re accounting of Jackson*, 270.

14. In case such decree was not rendered upon the trial of an issue of fact an appeal may be brought on without a case under the practice provided for by the latter part of § 998 of the Code.—*Id.*

15. A case on appeal did not appear to have been settled or signed by the trial judge. It contained a paper headed "requests to find," which contained no minute of decision by the judge, and one headed "refusals to find," which contained no refusal, but consisted of exceptions. *Held*, That the exceptions were of no avail.—*Harris v. Van Wart et al.*, 298.

16. A statement in a notice to the opposite attorney of a refusal of the judge to find as requested is not of itself sufficient.—*Id.*

17. An order directing a further return to a writ of habeas corpus or certiorari is not appealable to the General Term.—*In re Larson*, 364.

18. No appeal lies to the Court of Sessions from a judgment of a Court of Special Sessions charging the prosecutor in a criminal proceeding with costs of the prosecution.—*The People v. Norton*, 381.

19. The judgment herein was reversed at General Term and new trial ordered unless plaintiff should stipulate to reduce it to the amount of the first cause of action. Such stipulation was given. Defendant thereafter appealed to the Court of Appeals, which reversed the judgment and ordered a new trial. *Held*, That thereupon the stipulation ceased to be operative and that all the issues were open for a new trial.—*Crim et al. v. Starkweather*, 403.

20. When the judge's charge contains a misdirection in the law of the case and injustice may probably have resulted from it the Appellate Court is required to set aside the verdict and direct another trial of the action, although no exception may have been taken.—*Gossler v. Lisberger*, 429.

21. On appeal from a surrogate's decree adjudging an administrator in contempt appellant procured extensions of the time to file return. Pending such extensions the appeal was dismissed for failure to serve papers. Thereafter appellant procured a stay from the surrogate to allow him to pay or surrender himself, but did neither. On a subsequent motion to set aside the order dismissing the appeal, *Held*, That under the circumstances of delay and acquiescence the court could not interfere.—*In re estate of Boston*, 470.

22. An appeal to the Common Pleas from an

order of the General Term of the Marine Court granting a new trial is only allowed on condition that the appellant consents to final judgment against him in case of affirmance. Where no such consent is given the Common Pleas can acquire no jurisdiction and the appellant is not estopped from objecting to the want of jurisdiction by his having appeared and submitted his appeal. A judgment entered in such a case is void and equity will relieve therefrom.—*Wilmore v. Flack et al.*, 523.

23. The right of an appellant to withhold his consent cannot be taken away under the guise of correcting a mistake.—*Id.*

24. When a referee before whom an action was tried finds all the facts entitling the plaintiff to judgment, but, by an error of law, directs a judgment to be entered in favor of the defendant, dismissing the plaintiff's complaint, it is proper for the General Term upon the decision of an appeal to order judgment for the plaintiff upon the facts so found by the referee, and it is not necessary that a new trial should be ordered.—*Price v. Price et al.*, 557.

25. Where the appeal book contains only the judgment roll and exceptions to the findings of law of the court, the appellant, to succeed, must show that the trial court could not, in any view of the facts found, properly order a judgment for the other party.—*The Agricultural Ins. Co. v. Barnard*, 562.

SEE BARR, 1; COMMON PLEAS; CORPORATIONS, 26; CRIMINAL LAW, 1; HIGHWAYS, 3; PLEADING, 22; PRACTICE, 1, 12, 13, 27; SHERIFFS, 6; STAY, 1; TRUSTEES, 4; UNDERTAKING, 1-4.

#### ARBITRATION.

See APPEAL, 4; EXECUTORS, 13.

#### ARREST.

1. A judgment which leaves to be determined the allowance which an assignee is entitled to have deducted from the gross sum which he holds under a fraudulent assignment is not final. Final judgment should be entered after order made confirming the report of the referee appointed to ascertain the amount of such allowance, and such judgment can be enforced by execution and not by precept to arrest the assignee. No right to issue a precept can be acquired by omitting to enter final judgment.—*Myers v. Becker*, 39.

2. The provisions of Chap. 8, Tit. 13, Pt. 3, R. 8., do not apply to a case where money has been ordered to be paid by a final judgment.—*Id.*

3. A false statement made to a commercial agency for use in its business avoids a sale

of merchandise which was made in reliance upon such statement, and in an action to recover the merchandise, if in the meantime it has been sold by the defendant, an order of arrest may be obtained upon the ground that the defendant has concealed, removed or disposed of the goods so that they cannot be found by the sheriff and with intent that they should not be so found or to deprive plaintiff of the benefit thereof.—*Schule v. Harris*, 54.

4. Where the certificate to the notary's jurat to an affidavit verified out of the State is defective the affidavit is a nullity, and an order of arrest granted on it must be vacated. The defect is jurisdictional and the affidavit cannot be ordered from the files for amendment.—*Harris v. Durkee*, 355.
5. Information is, ordinarily, insufficient to sustain so grave a proceeding as an order of arrest, and, if it should be acted upon in any case, the information should appear to have been derived in an apparently authentic and circumstantial manner from persons whose affidavits at the time are not attainable.—*Frank et al. v. Sprinze et al.*, 452.
6. An intent to put property beyond the reach of its owner by any act, the other elements appearing, will justify an order of arrest under § 550, sub. 1, Code Civ. Proc., though the fraudulent actor may not contemplate an action at law to recover the specific property.—*Lippman et al. v. Shapiro*, 504.
7. In such a case, a fraudulent purchaser is affected by his knowledge that the circumstances justify a reclamation against him.—*Id.*

See ATTORNEYS, 2.

### ARSON.

1. On a trial for arson in the third degree two accomplices swore that defendant was to and did purchase cheap horses to be exchanged for more valuable ones before the fire. Several witnesses testified to selling cheap horses to defendant and one S. swore to the exchange of horses being made. The court refused to charge that there was no evidence to corroborate the accomplices. *Held*, No error.—*The People v. Hooghkirk*, 322.
2. Evidence of the defendant on cross-examination in such cases with reference to his connection with other fires and with insurance on other property burned is admissible in the discretion of the court as affecting his credibility.—*Id.*

### ASSAULT.

1. On a trial for an assault the prisoner, on cross-examination, was asked whether he

had assaulted a fellow member of the legislature. *Held*, That the question was a proper one.—*The People v. Irving*, 7.

2. The prisoner struck complainant on the head with the butt end of a pistol. *Held*, That the description of the pistol by its name in connection with the character of the wound inflicted was sufficient to carry to the jury the question whether it was an instrument likely to produce grievous bodily harm.—*Id.*
3. On the trial of an indictment for an indecent assault the complainant was allowed to testify to a conversation between herself and her grandmother in the absence of defendant and that she had not been allowed thereafter to go to defendant's house. *Held*, That the evidence was immaterial and inadmissible.—*The People v. Persons*, 106.
4. Assent by the girl, although under ten years of age, may be established as a defense to a charge of indecent assault.—*Id.*
5. A Roman Catholic priest having charge of a parish under his bishop, in whom is the legal title, has the right to regulate the price and occupancy of pews and to eject from the church parishioners who refuse to comply with the regulations.—*Crowley v. Miller*, 262.
6. A pistol is a fire-arm, and the act of discharging a loaded pistol "at, towards and against" another, with intent to kill him, is an offense within § 217 of the Penal Code.—*The People v. Whedon*, 384.
7. The exclusion of testimony offered to show that the prisoner was insane "some months" before the shooting. *Held*, Error.—*Id.*

See CRIMINAL LAW, 2.

### ASSESSMENTS.

1. While one cannot come in on the foot of a judgment to which he was not a party and ask the same relief which was awarded to the plaintiff in the proceeding in which it was obtained, yet where an assessment is about to be enforced against his property he may have the benefit of a judicial decision in respect to it, especially where the assessment has been declared to be absolutely void.—*Chase et al. v. Knowles*, 89.
2. Chap. 550, Laws of 1880, was not designed to take away any common law right of defense against the enforcement of a void tax or to validate erroneous or void assessments, but to incite to diligence the aggrieved taxpayer.—*Id.*
3. An owner of real property in New York city, who has paid an assessment on such property which was not void upon its face, may maintain an action against the city to recover back a portion of such assessment which has been adjudged to have been illegally imposed in a proceeding instituted by

another person owning property subject to the same assessment, although such portion of said assessment has never been adjudged to be invalid as against the plaintiff in a direct proceeding brought by him to review the same.—*Delano v. The Mayor, &c., of N. Y.*, 141.

4. Payment of an assessment for local improvements in the city of New York before petition filed to vacate it is a good defense to the application to vacate.—*In re Wood et al.*, 344.
5. After a joint petition by 37 property owners to vacate assessments on separate lots of land owned in severalty by them for constructing an outlet sewer in 66th street in New York city, and after a delay of over ten years after filing such petition without taking any proceedings thereon and after the assessment levied had been paid, an application was made to sever the petition originally filed into separate petitions of the property owners and such leave to sever the joint petition was granted. *Held*, Reversing the order below, that it is doubtful whether the court has such power, but if it has it should not have been exercised in this case after such great laches and the practical abandonment of the original petition, especially as granting the application enables the petitioners to place themselves by reason of their negligence, owing to new rulings of the courts, in a position far better than they enjoyed before.—*Id.*
6. A certificate of the Commissioner of Public Works specifying the amount of the assessment, and that "the apportionment of the assessment may be made," is not a compliance with the requirement of § 8 of Chap. 565, Laws of 1865. The statute imposes the duty of apportionment on the Commissioner, and the power to do so cannot be delegated by him.—*In re petition of Hearn*, 385.
7. An application, under Chap. 338 of the Laws of 1858, to vacate or reduce, etc., an assessment can be made only by the person owning the property assessed, or by those jointly interested in it, and a joint proceeding by persons owning several distinct interests or titles is not authorized by that act.—*In re petition of Mehrbach*, 465.
8. If such a joint proceeding is commenced, and an order is afterward made granting leave to the parties to sever their petition and to serve separate ones, its effect is to discontinue the joint proceeding, and the service of an individual petition commences a new proceeding, to which the payment of the assessment, after the commencement of the joint proceeding but before that of the individual one, constitutes a defense.—*Id.*
9. The intention of Chap. 550 of the Laws of 1880, providing for a commission for the purpose of reviewing certain assessments

made in the city of New York for local improvements, was to leave the question whether substantial injustice had or had not been done in a given case to this special tribunal as one of fact to be finally determined by it, and in case it was found that such injustice had been done to clothe it with power to award such relief as under the circumstances it should judge upon the evidence presented to be just and equitable, and the power of the court to review its decision by certiorari should be exercised with the greatest caution and be restricted to cases of clear excess of jurisdiction or gross abuse and injustice. Although the authority of this commission is a judicial one in its nature, it is of such a character as to relieve the commissioners from the technical rules of a court of law and clothe them with the amplest powers to do in each case whatever they think to be just and equitable on the evidence presented.—*The People ex rel. Jessup v. Kelly et al.*, 569.

See CLOUD ON TITLE. 2.

#### ASSIGNMENT.

See MORTGAGE, 12-14; TRUSTS, 5.

#### ASSIGNMENT FOR CREDITORS.

1. Defendant's firm made a general assignment for the benefit of creditors to plaintiff *iff*, who accepted the trust. Thereafter plaintiff delivered a portion of the assets to defendants on their indemnifying him against the claims of creditors and quitting the balance of the assets to him, but he was never removed or discharged as assignee nor his bond cancelled. After this the government made its draft to defendants' firm in settlement of a claim against it which was a part of the assets of the firm, though not included in its schedule. This draft was received by L., and was deposited by him to his individual credit. *Held*, That the title of plaintiff, as assignee, to the draft was not lost or merged, and as such he was entitled to collect the claim.—*Stanford v. Lockwood et al.*, 155.
2. At the time of the aforesaid arrangement the administratrix of a former member of the firm executed a general release to plaintiff. *Held*, That she thereby ratified the transfer of the assets to him and freed them from any claim she might have in equity to require their application to the debts of the old firm.—*Id.*
3. In 1877, but before Ch. 466, Laws of 1877, went into effect, S. made an assignment for benefit of creditors, and his assignee leased premises before filing a bond or inventory. After filing the same the assignee recognized the lessee as tenant and accepted rent. *Held*, That the assignment was not void, and that the acceptance of rent ratified the lease if invalid when made, and that under it the tenant was entitled to the crops.—*Smith v. Newell*, 225.



4. Where, in case of an assignment for benefit of creditors, the assignment purported to be of all the property contained in schedule B to pay the debts contained in schedule A, and set forth that the schedules were attached, and such schedules were neither attached nor recorded, *Held*, That the assignment being complete and conveying all the debtor's property without them, they were not a necessary part of it and the assignment was sufficient under the statute.—*Burghard v. Sondheim et al.*, 852.
  5. An assignment for the benefit of creditors takes effect from the time of its delivery, but has no greater effect as to passing title than any other conveyance, and does not operate on the creditors without their consent.—*Warner v. Jaffray et al.*, 388.
  6. The rule that the voluntary transfer of personal property is to be governed everywhere by the owner's domicile yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined and where the law and policy of the State where the property is located prescribe a different rule of transfer.—*Id.*
  7. The law of Pennsylvania provided for the recording of assignments by non-residents to take effect from their date, provided that no *bona fide* creditor having a lien before the record without actual notice of the assignment should be affected. After the assignment was delivered in this State, but before it was recorded in Pennsylvania, defendants attached property of the assignor in that State. *Held*, That the title to the property in that State did not pass to the assignee before the attachment. *Id.*
  8. An unliquidated claim for damages is not provable against an assigned estate in the hands of an assignee.—*In re assignment of Adams et al.*, 526.
- See ARREST, 1; ATTACHMENT, 8; CREDITORS' ACTION, 1; FRAUD, 10; PLEADING, 18; REDEMPTION, 1; SHERIFFS, 10; STAY, 2; VENUE.
- ### ATTACHMENT.
1. Although the affidavit on which a warrant of attachment is issued fails to state a cause of action the attachment is not rendered incurably defective thereby, and if a motion to vacate it is made upon affidavits on the part of defendant plaintiff can sustain it by additional affidavits showing that a cause of action exists.—*Coffin et al. v. Stitt*, 22.
  2. Neither a statutory liability nor a judgment creates a contract upon which attachment will lie.—*The Remington Paper Co. v. O'Dougherty*, 53.
  3. Where an affidavit for attachment stated that defendants, commission merchants, sold plaintiff's property contrary to instructions, but made no averment that the market value at the time of sale exceeded the price at which the property was sold, or that it afterwards rose above that price, *Held*, That no right is shown to more than nominal damages, and that property can not be attached upon a claim for nominal damages only.—*Watts v. Nichols et al.*, 165.
  4. Objections to the entitling of motion papers cannot be taken for the first time on appeal.—*Id.*
  5. One defendant copartner may move to vacate an attachment against partnership property.—*Id.*
  6. A sheriff, under an attachment against one J., demanded the delivery to him of a note and mortgage then in the possession of J.'s attorney, who refused to deliver them up or give a certificate. The attorney was afterwards compelled to deliver them up to the sheriff, but prior thereto J. assigned them to plaintiff, who brought action to foreclose. *Held*, That until the sheriff obtained the actual custody of the property he could make no levy, and that he had no interest in the action or right to intervene.—*Anthony v. Wood et al.*, 177.
  7. An affidavit stating that "on Oct. 6, 1883, defendants represented to a commercial agency, as appeared by the report of such agency, that the surplus of their assets over their liabilities was \$46,500; that two of the creditors of defendants had written to such agency stating that they waived payment of their demands until after payment of all other indebtedness; that on Nov. 17, 1883, defendants made a general assignment preferring certain promissory notes; that deponent alleges that some of such preferences were for the demands agreed to be waived; that some of said notes were dated from two to five days prior to the assignment, and that the money loaned upon them was not on hand and was not delivered to the assignee; that nothing had happened to cause the loss of the surplus claimed by defendants on Oct. 6th, and consequently the assets must have been concealed, hidden, or disposed of in some underhand way; and that deponent believes that the preferred promissory notes represented fictitious claims in whole or in part," is not sufficient to sustain an attachment granted upon the ground that defendants had removed, disposed of and assigned their property with intent to defraud their creditors.—*Struthers v. Hoffstadt et al.*, 242.
  8. Defendant made a general assignment for the benefit of creditors, and preferred as a creditor his dormant partner in the business. *Held*, That such fraudulent preference renders the assignment void as to

creditors, and the facts formed a sufficient basis for an attachment against the firm property at the instance of one of the creditors.—*Clafin v. Hirsch*, 248.

9. Where, in an order of attachment, plaintiff's affidavit did not show that an action had been begun and that a summons had been issued, and did not state facts from which fraud could be inferred, except upon information and belief, at the same time failing to show the informants, *Held*, That the omissions were fatal.—*Partridge v. Brown*, 484.

10. An order directing the sale of live animals attached may be made before an inventory of the attached property has been made and filed, and such order may be made upon the application of the plaintiff upon notice to the defendant. The sheriff is not a necessary party to the proceeding.—*Byrnes v. Robinson*, 454.

11. When in an action in which an attachment has been issued a percentage upon the value of the property attached has been granted as an additional allowance of costs and has been included in the judgment, and the attachment has been subsequently vacated, the defendant is entitled to have the amount of such percentage stricken from the costs adjusted and from the judgment, notwithstanding the fact that, previous to the motion to strike out said sum, the judgment had been affirmed on appeal to the General Term when the right to these costs was in no manner drawn in question by the appeal.—*Parsons et al. v. Sprague*, 467.

See CORPORATIONS, 23; EXECUTION, 8; SERVICE, 2.

#### ATTORNEYS.

1. An *ex parte* order of the court, made upon the petition of the attorney for a receiver of an insolvent corporation, directing such receiver to pay a certain sum to said attorney for legal services without any investigation as to the value, &c., of such services, is a nullity and may be attacked collaterally on the accounting of the receiver.—*In re The Commonwealth Fire Ins. Co.*, 57.

2. The client is not liable for the act of his attorney in directing the sheriff to arrest the wrong person under a warrant of attachment issued in the action, it not appearing that such client gave special authority, express or implied, to the attorney to arrest such person, or ratified the act of the sheriff in so doing.—*Gearon v. The Bank for Savings*, 483.

See COSTS, 2; EVIDENCE, 11, 13; EXECUTION, 2; PRACTICE, 5; RECEIVERS, 2; REFERENCE, 3; WILLS, 14, 15.

#### BANKRUPTCY.

1. A seat in the Stock Exchange is property,

and may, under the conditions prescribed in its constitution and by-laws, be transferred. Such seat, as between a bankrupt and his assignee, will fully pass under the assignment and be vested in the assignee.—*Platt v. Jones*, 115.

2. Where it does not appear that the bankrupt has interfered with or denied the assignee's rights in the property, the courts will not, until the assignee has given notice of such transfer to the Exchange, restrain the bankrupt from acting as one of its members.—*Id.*

3. The words "I owe you a claim. I shall pay it every dollar I owe you. I am under great moral obligations to you and I shall pay it," are sufficient to revive a debtor's liability to pay a debt which had been barred by his discharge in bankruptcy.—*Decker v. Kitchen*, 379.

See BONDS, 7; CORPORATIONS, 18; LIFE INSURANCE, 5.

#### BANKS.

1. Where a president of a national bank is allowed to usurp the functions of the board of directors and virtually to become and be the bank as representing all its corporate functions and to use the bank for his own private business and purposes until he becomes largely indebted to it, and then, with the knowledge of the bank, starts out to obtain money with which to pay such indebtedness, the bank is chargeable with notice of any fraud which he may commit in obtaining money which the bank receives in such payment.—*The City Natl. Bk. of Dallas v. The Natl. Park Bk.*, 166.

2. The implied contract to repay money obtained by fraud consummated by means of a conspiracy is joint and several between the conspirators, and an action on such implied contract may be brought against one conspirator to recover the whole amount so obtained, and, in a proper case, such liability of one conspirator on such implied contract may be asserted as a counterclaim against him in an action brought by him against the injured party.—*Id.*

3. A bank incorporated under Chap. 824, Laws of 1851, is authorized to make loans from its available fund upon personal securities.—*The Rome Sargs. Bk. v. Kramer et al.*, 387.

4. A plea of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish a legal wrong.—*Id.*

5. Under the National Banking Act a bank may take a mortgage to secure future advances to be made by the bank. The mortgagor or his creditors cannot defend against a loan because the amount exceeded one-tenth of the capital of the bank; it being

no offense against the borrower that the officers of the bank violated their duty.—*The Manufacturers' Natl. Bk. v. Rober et al.*, 476.

See BONDS, 3, 4; FORGERY, 1, 2; LOAN COMPANIES; SALE, 2; TRUSTS, 3.

### BAR.

1. An order denying a motion to make the sheriff a party, which is not appealed from, concludes the parties, and such order is not brought up by an appeal from the final judgment when the notice of appeal does not state that it was intended to do so.—*Snyder v. Bliss et al.*, 304.

2. On a sale on foreclosure the mortgagee bid in the premises for less than the mortgage, and gave an option allowing one B. to purchase the premises within a certain time on payment of the amount of his mortgage and the mortgage of one R. This option was assigned to A., who agreed to perform the terms and conditions thereof, but failed to do so within the time limited. A. subsequently purchased the premises. In an action brought by R., in 1870, to recover the amount of his mortgage under the terms of the option, judgment was rendered against him. In this action, begun in 1879 by R.'s administrator to charge A. with a trust in said premises, *Held*, That the former adjudication was a bar; that the action could not be maintained on the ground of fraud as the statute of limitations was a bar and that it was not a case for the application of the doctrine of constructive trusts.—*Harpending v. Arnot*, 418.

See BONDS, 2; CHARTER PARTY, 2; FRAUD, 14; JOINT DEBTORS, 1; JUDGMENT, 3; LIMITATION; PLEADING, 6.

### BENEVOLENT SOCIETIES.

1. Plaintiff was the designated beneficiary as the wife of S. in a certificate issued by defendant. In an action to recover upon the same it was claimed that S. was previously married in England and that such marriage remained in force until his death. *Held*, That the certificate operated as an assent by defendant to plaintiff's appointment as beneficiary and entitled her on the death of S., in the absence of any other appointment, to demand and receive the fund.—*Story v. The Williamsburgh Masonic Mut. Ben. Soc.*, 4.

2. A by-law prescribing the duty of the association to pay to the lawful widow of a deceased member does not prevent it from recognizing as a beneficiary one designated by the member as holding the relation to him of wife.—*Id.*

### BILL OF PARTICULARS.

See PLEADING, 16.

### BONDS.

1. Defendants gave plaintiff a bond conditioned to properly support, maintain, clothe, board and furnish with all necessities plaintiff's wife during her natural life. *Held*, That defendants were bound thereunder only to furnish the wife support at their houses or at some suitable place; that it was error to charge that the wife might obtain board anywhere and defendants be chargeable.—*Zimmer v. Settle et al.*, 245.

2. Where after the giving of such a bond the husband suffered his wife, who had separated from him, to return to his house and live there. *Held*, That this was a satisfaction and bar to an action by him on the bond.—*Id.*

3. The fact that a bank teller had already entered upon the performance of his duties when a bond for his good behavior as such teller was signed by the sureties does not deprive such bond of its consideration if the teller had entered upon the duties of his employment with the understanding that such a bond should be given, and if his employment was contingent until that was done.—*Platt v. Ashman*, 297.

4. Such a bond given by a bank teller during his employment as such, to supply the place of a bond of the same kind previously given, which had been lost, is not without consideration if the bank could have terminated his employment if such bond had not been supplied.—*Id.*

5. The right of a *bona fide* holder for value of a negotiable bond issued by a railroad company to recover thereon is not affected by the fact that the railroad sold the bonds at a discount contrary to the provisions of their charter, which forbade the sale of them at less than their par value.—*Ellsworth v. The St. Louis A. & T. H. RR. Co.*, 369.

6. One term of court ends when the next succeeding term begins, and the court cannot, by adjourning one term to the day on which the next begins, so tack the first term to the second as to continue the liability of parties to a bond binding by its terms for the first term.—*The People v. Swales et al.*, 445.

7. Defendants in 1873 instituted proceedings against plaintiff, in the United States District Court in Alabama, to have him declared bankrupt, and after the issuance of a provisional warrant of bankruptcy against plaintiff's estate defendants were required to give a bond to indemnify him from damages and from said warrant in case proceedings should be dismissed. In an action on the bond, *Held*, That the order for it being by a statutory court, and not expressly authorized, it was not within the line of judicial discretion, and therefore was void.—*Sonneborn v. Libby et al.*, 469.

See GUARDIANS, 8, 4; SHERIFF, 5, 6; UNDERTAKING.

BRIDGES.

1. In 1879 a bridge, which was part of a highway and which crossed a stream dividing certain towns, was out of repair. The commissioners of highways of the several towns met and repaired it and settled their accounts upon the basis that plaintiff's town should bear half the expense and the two other towns each a quarter. Plaintiff discovered that his town should have paid only one-third. He demanded of the defendant his share of the over payment, which was refused. It appeared that the board of supervisors of defendant's town had taken no action to apportion the expense of the repairs under Ch. 482 of Laws of 1875. *Held*, That plaintiff as commissioner of highways could, under Ch. 225 of 1841 as amended by Ch. 383 of 1857, maintain this action for the amount paid in excess of the legal share of his town.—*Surdam et al. v. Fuller*, 65.

BROKERS.

1. In a case where the contract is for the sale of very valuable property without immediate payment, accompanied by a large loan to the purchaser, who is to procure a further loan and erect upon the property very valuable buildings, the ability of the purchaser to carry out such contract and his responsibility upon failure to answer in damages is a most important element, and a broker who intervenes to bring about such a contract is bound to see that the buyer he produces is able and responsible, and however far the parties may proceed upon the assumption that he is of that character the vendor may refuse to go on when, before the contract is consummated by its actual execution and delivery, he discovers that the proposed buyer is pecuniarily unable to perform his contract, and in such a case the broker is entitled to no commissions.—*Phelan v. Schell*, 49.
2. Where plaintiff and defendant agreed that plaintiff was to furnish a purchaser to defendant, which was done, and thereupon the purchaser and defendant entered into a contract for purchase? *Held*, That the contract was one of brokerage; that plaintiff had performed his service as broker when he produced a customer satisfactory to defendant, and was thereupon entitled to his commission as such. That certain allegations in the complaint did not amount to the allegation of conditional contract between plaintiff and defendant.—*Loffler v. Breitenstein*, 444.

See AGENCY, 6, 9.

CERTIORARI.

- 1 A writ of certiorari can be granted only at a General or Special Term of the Supreme Vol. 19.—No. 25a.

Court.—*The People ex rel. Burhaus v. Supra. of Ulster Co.*, 208.

- 2 When the order granting the writ shows, by its heading that the writ was regularly granted at a Special Term, at a time and place where a Special Term for hearing *ex parte* motions, &c., might have been held, and that it was allowed by one of the justices of the court, this should be held conclusive on a motion to quash.—*Id.*

See APPEAL, 17; DISORDERLY PERSONS; SALARY; SUPERVISORS, 3.

CHARTER PARTY.

- 1 Defendants chartered a barge, properly manned, of plaintiffs, for a certain period, but after using it for three months abandoned it and left it lying exposed to the weather. *Held*, That the plaintiffs had a right to resume possession of and use the barge, and to recover the difference between the amount agreed to be paid and the net earnings of the barge during the balance of the period.—*Johnson et al. v. Meeker et al.*, 158.
2. A former recovery for the use by defendants of the vessel is no bar to an action to recover damages for a breach of the contract by a subsequent neglect to use it.—*Id.*

CHATTEL MORTGAGE.

1. The refiling of a chattel mortgage with proper certificate, although more than a year since the mortgage was first filed, will revive the mortgage as against an execution issued and delivered to the sheriff after such filing, upon a judgment rendered prior thereto.—*Nixon et al. v. Stanley*, 451.

See EXECUTION, 1.

CIVIL DAMAGE ACT.

1. The civil damage act does not require the intoxication to be the direct result of the liquor got of defendant in order to render the latter liable.—*Becker v. Barnum*, 94.
2. A vendor of liquors is liable under the Civil Damage Act where the act by which plaintiff is deprived of his support was the result of intoxication, although not a natural consequence of the liquor sold. The cause of action is not taken away or mitigated because the injury also constitutes a crime.—*New v. McKechnie et al.*, 132.
3. Defendants sold to plaintiff's father lager beer in quantities less than five gallons in violation of their license. In consequence of the intoxication produced in part thereby plaintiff's father murdered his wife and committed suicide. *Held*, That defendants were liable for the damages sustained by plaintiff for loss of support and that the case was one where exemplary damages might be awarded.—*Id.*

## CLOUD ON TITLE.

1. An action to set aside a certificate on a sale for unpaid taxes, as a cloud on title, within a month after the tax sale is premature.—*Clarke v. Davenport*, 6.
2. To authorize a court of equity to remove the lien of an assessment as a cloud on title it must appear that the record of proceedings is not void on its face, and that the claimant under it would not by his proofs in an attempt to enforce his claim develop the defect rendering it invalid.—*Id.*
3. Mere apprehension and groundless fears are not enough to sanction such an action, but it must appear that there is a determination to create the cloud.—*Id.*
4. An action to set aside certain conveyances of real property to defendant as clouds upon plaintiff's title to such property cannot be maintained when it appears that, even if such conveyances were set aside, defendant would still have an undisputed title to the premises in question derived from another and an independent source.—*Masterson v. Granitch*, 55.
5. In such an action it can be proved, under an allegation in the answer that subsequent to the conveyances attached the land in question was sold by the sheriff to a third party under a judgment against plaintiff, that defendant has purchased the title of such third party.—*Id.*
6. The necessity of a resort to extrinsic evidence, in any event, to show the validity of plaintiff's title to real estate as against a purchaser at an execution sale, gives plaintiff a good cause of action to restrain the sale.—*Riley v. Schoeffel et al.*, 438.

See TAXATION, 11.

## CODE CIVIL PROCEDURE.

See APPEAL, 1, 10, 11, 13, 14; ARREST, 6; COMMON PLEAS, 1; CONTEMPT, 1, 8; CORPORATIONS, 6; COSTS, 11; DECEIT, 1; DEPOSITIONS, 1, 4-6, 9; EVIDENCE, 8, 16, 18, 25; JOINT DEBTORS, 1; JURISDICTION, 4; LIMITATION, 3, 4; PLEADING, 6, 19; PRACTICE, 12, 15, 16, 27; RECEIVERS, 6, 7; REFERENCE, 3; SHERIFFS, 7; SLANDER, 3; STAY, 1; SURROGATES, 3; WILLS, 15.

## CODE CRIMINAL PROCEDURE.

See CRIMINAL LAW, 6; DISORDERLY PERSONS, 1; FORGERY, 5; JURORS, 3; UNDERTAKING, 6.

## COMMON CARRIERS.

1. A provision in a shipping receipt given by an express company, that it will not be liable for loss or damage unless the claim therefor is presented in writing within thirty

days from the date of the receipt, etc., makes it necessary to show such presentation, etc., as a condition precedent to recovery, whether the action be on contract, or for conversion based on erroneous delivery.—*Herahberg v. Dinsmore*, 497.

2. A stock release which provides for the release of the carrier from all liability for injuries which the animals may receive in consequence of the negligence of the carrier's servants, or in consequence of insecurity of cars, exempts the carrier from liability for injury to the animals in consequence of a defective door in the car in which they are transported.—*Wilson v. The N. Y. U. & H. R. R.R. Co.*

## COMMON PLEAS.

1. The Court of Common Pleas will not review a discretionary order of the City Court, and there is nothing in § 3191, Code Civ. Proc., or the amendments thereof, which makes it incumbent upon the court to entertain such appeals.—*Walsh v. Schultz*, 460.
2. The Court of Common Pleas holds the same position with respect to the City Court that the Court of Appeals holds with respect to the Supreme Court and the Superior City Courts.—*Id.*

See APPEAL, 22, 24.

## CONSIDERATION.

See BONDS, 3, 4; CONTRACT, 5, 14; NEGOTIABLE PAPER, 1, 4, 8.

## CONSPIRACY.

See BANKS, 2; DEPOSITIONS, 8.

## CONSTITUTIONAL LAW.

1. Where the title of an Act of the Legislature expresses a general purpose all matters fairly connected with it are proper to be incorporated in the Act and are germane to its title.—*The Utica Waterworks Co. v. The City of Utica*, 14.
2. Various terms and conditions of a contract to furnish a city with water by an incorporated company considered.—*Id.*
3. Chap. 259, Laws of 1882, which declares that "the pier known and designated as No. 2 in the East River in the City of New York, and the land under water lying easterly of the said pier to the westerly side of Pier No. 8 shall after the 15th day of June, 1882, be devoted and set apart for the purposes of additional ferry accommodations for the \* \* \* Union Ferry Company" violates Art. 3, § 18, of the Constitution of the State of New York, providing that the legislature shall not pass a private or local bill granting to any pri-

vate corporation, association or individual any exclusive privilege, immunity or franchise whatever, and is consequently unconstitutional and void.—*In re The Union Ferry Co.*, 101.

4. Chapter 260, Laws of 1867, § 15, granting to the Police Justice of the village of Cox-sackie "jurisdiction of all criminal cases the same as is now possessed by justices of the peace of towns" is constitutional; and under it the jurisdiction of the magistrate does not extend beyond the village limits.—*Bocock v. Cochran*, 214.
5. Where two constructions of a statute are possible, that one should prevail which will uphold the statute rather than one which will condemn it.—*Id.*
6. The acts of 1876 and 1879, granting to the U. S. the right to acquire the right of way necessary for the improvement of the Harlem River, &c., are not unconstitutional.—*In re petition of the U. S.*, 329.
7. The Federal Government may lay aside its sovereignty and enter the State courts as a petitioner and procure the condemnation of land for its public use through proceedings authorized by the State legislature.—*Id.*
8. A question as to the constitutionality of a law should not be decided in any case unless it is properly presented and necessarily involved.—*The People ex rel. Augerstein et al. v. Kenny et al.*, 393.
9. Voters can waive their constitutional right to vote for all the officers to be elected and their ballots be valid.—*Id.*
10. Chap. 413, Laws of 1876, entitled "An Act in relation to the clerks, officers, and attendants of the Marine Court of the City of New York," is not a local or private bill, but relates to a part of the judicial system of the State, which makes the officers named in the bill State officials.—*McDonald v. The Mayor, &c., of N. Y.*, 513.
11. Chap. 272, Laws 1884, prohibiting the manufacture of segars in certain classes of tenement houses in certain cities, is unconstitutional as unlawfully interfering with the right of every person to employ his labor in any occupation not inimical to the public peace, safety or health, for although passed ostensibly with the purpose of improving the public health, it is within the power of the Court to inquire whether such is its actual purpose, and it is apparent from its provisions that such was not the intention of the Legislature in enacting it.—*In re Jacobs*, 533.

See CONTEMPT, 8; JUSTICES OF THE PEACE; NEW YORK CITY, 8; REFERENCE, 8; SHEPHERD'S FOLD; SHERIFF, 7, 8; UNDERTAKING, 2.

## CONSTRUCTION OF STATUTES.

See STATUTES.

## CONTEMPT.

1. Under § 2272 of the Code of Civil Pro. a referee of the whole issues of an action may make an order to show cause why a party should not be punished for a contempt, returnable either before himself or before the court; and, in the latter event, it is the duty of the court to hear and determine the motion on its merits; and it is error for it to deny the motion on the ground that the referee had power to punish for the contempt and that it is a matter which he should decide.—*Naylor v. Naylor*, 79.
2. The Legislature has no power, except when exercising the limited judicial powers expressly given it by the Constitution, to punish a witness as for a contempt in refusing to answer a question put to him by a duly authorized legislative committee.—*The People ex rel. McDonald v. Keeler*, 198.
3. The Statute, 1 R. S., m. p. 154, § 13, subdiv. 4, which confers upon each house power to punish such a refusal as a contempt and by imprisonment, is unconstitutional; the legislature cannot confer upon itself authority to try, convict and punish in a proceeding (*e. g.*, for a contempt) which is clearly judicial.—*Id.*
4. The rights of one thus imprisoned by the Senate may and must be considered and passed upon by the court in the habeas corpus proceedings. The prisoner should not be remanded, as there is no other proceeding or manner in which the matter can be presented.—*Id.*
5. Upon such an examination before a legislative committee the witness is entitled to counsel.—*Id.*
6. The materiality of the questions put the witness in this case considered.—*Id.*
7. Defendant in an action for limited divorce was ordered on his default to pay alimony and counsel fee pending the action, and on his stipulating to pay costs and disbursements the matter was reopened and sent to a referee to take proof of defendant's ability to pay, etc. Plaintiff succeeding, defendant was ordered to pay the fees of referee and stenographer, and on his neglect so to do, the issuance of a precept was ordered directing his detention until payment, etc. *Held*, On appeal from order for precept, that it was properly served on the attorney who had appeared for defendant in the action; that the payment of the fees being a condition of a favor the defendant should pay them on notification of the amount and an order directing payment can be entered without formal demand. And that an order for a precept must adju-

- dicare in terms that the accused has committed the offense charged, and that it was calculated to or did defeat, impair, etc., the right or remedies of plaintiff.—*Mahon v. Mahon*, 848.
8. An order adjudging a party in contempt and directing his commitment for failure to pay alimony need not contain an adjudication that payment of the alimony could not be enforced by means of security or the sequestration of his property. Neither § 1772 nor § 1773 requires such adjudication to be stated or recited in the order.—*Ryer v. Ryer*, 858.
  9. The court will presume, where such an order is collaterally attacked, nothing to the contrary appearing, that the affidavits and proofs upon which the same is based were sufficient to warrant granting the order.—*Id.*
  10. A party will not be released from imprisonment by reason of inability to comply with the judgment directing the payment of alimony, when the inability has arisen from defendant's marrying again, in another State, in violation of the provisions of the judgment of divorce. Such inability voluntarily and intentionally created does not entitle the applicant to the favorable consideration of the court.—*Id.*
- See DIVORCE, 1.
- ### CONTRACT.
1. An agreement to sell land presupposes title in the seller, and cannot be performed by an assignment of a certificate of sale of the land for taxes.—*Burroues v. Peck*, 15.
  2. Where money was paid upon such a contract by a laboring man, who had no knowledge of the requisites of a good title, relying upon a representation that a deed from the comptroller would be the strongest one he could get, *Held*, That he was entitled to recover back the money so paid.—*Id.*
  3. Construing certain canal contracts, and deciding that overpayments by the State on one contract, in the absence of fraud, are a good set-off in an action by the contractors on the other contracts.—*Belden et al. v. The State*, 27.
  4. Plaintiff's intestate agreed to exchange his house and lot for four lots claimed to be owned by defendants. Defendants' deed described said lots, but in fact they did not own them. In an action to rescind the contract and intestate's deed the defendants claimed that they intended to convey a triangular piece near by, and that the description in the deed was substituted by mistake, and asked to have their deed reformed. *Held*, That this could not be done; that as the minds of the parties did not meet no actual contract existed, and the former contract should be rescinded and the parties restored to their original positions.—*Crowe et al. v. Lewin*, 85.
  5. When husband and wife have separated by mutual consent, the wife's agreement to return is a good consideration for a promise by the husband.—*Dewey v. Durham*, 47.
  6. The time of the payment of money provided for by a written instrument may be extended by parol.—*Schmidt v. Cooperthwaite et al.*, 63.
  7. What constitutes a valid extension?—*Id.*
  8. A contract to sell Scotch pig iron "to arrive as specified below, subject to the dangers of the sea. 500 tons of Coltness pig iron at \$36 a ton, for shipment, to be due here in April next. 500 tons of Caulder pig iron at \$34 per ton, for shipment, to be due here in March next. Payable on arrival here by four months' note," is not an entire one for the sale and delivery of 1,000 tons of iron to be paid for by a four months' note on the delivery of the whole, but is a divisible one for the sale and delivery of two consignments of iron of 500 tons each, to be paid for on the delivery of each by a four months' note. The failure in the arrival of the consignment to arrive in March would not therefore justify the refusal by defendants to receive and pay for the consignment which arrived in April according to the terms of the contract.—*Pope et al. v. Porter et al.*, 103.
  9. Such a contract cannot be satisfied by the tender, at the proper time, of 500 tons of iron of the kind and quality called for by such contract, but which was bought at the port of arrival.—*Id.*
  10. To entitle a party to recover on a contract to compensate him for the support and maintenance of a third person, he must actually furnish such support and maintenance. The other parties to the contract cannot be called upon to pay for the support such third person has refused to receive.—*Cornell v. Cornell et al.*, 184.
  11. Plaintiff, being under indictment for poisoning stock of T., deposited money with R., a banker, M., his attorney, saying to R. that the money was to be paid to plaintiff or T., and that he would tell him to which one. The deposit was made upon an agreement between plaintiff and T., that if the indictment were nolle pros'd T. was to have the money, if not, it was to be returned to plaintiff. Of this agreement R. never had any knowledge. The indictment was not nolle pros'd, and plaintiff was tried and acquitted. In an action by plaintiff against R.'s executors for the deposit, *Held*, That the agreement between plaintiff and T. was illegal, and that as plaintiff must show this agreement to establish his cause of action he could not recover.—*English v. Rumsey et al.*, 204.

12. Where the parties orally agreed to exchange lands, and defendant agreed to pay certain mortgages on the land to be transferred to him, and afterwards the parties signed a written agreement providing that plaintiff should convey subject to the mortgages, and plaintiff ultimately deeded according to contract, subject to the mortgages, but neither the written agreement nor the deed contained defendant's agreement to pay the mortgages, and defendant failed to pay them, *Held*, That testimony of defendant's oral promise to pay the mortgages was admissible in plaintiff's suit to recover money paid by him on the mortgages.—*Guinnip v. Close*, 226.
13. Payment of a judgment by a note is good when the note has been received in satisfaction of the judgment.—*Id.*
14. Plaintiff, who was in possession of certain premises under a contract to purchase of defendant, being in default in his payments, it was agreed between the parties that the contract should be cancelled, possession surrendered to defendant, and that in consideration thereof defendant should pay to plaintiff whatever the premises should sell for over the contract price, *Held*, That there was a good consideration for the agreement, and that, these premises having been sold, plaintiff was entitled to recover the difference between the amount due on the contract and the price for which the premises were sold.—*Stebbins v. Breese*, 261.
15. Certain facts considered and held not to constitute a mutual rescission of a contract.—*Norton v. Yerdon*, 296.
16. A contract between tenants in common to sell the premises within a given time for a specified price, or after that time at public auction, contained a provision that if either party should fail or refuse to execute a deed of the premises he should pay \$500 to the other party as liquidated damages for non performance. *Held*, That this provision was intended as an indemnity against liability to a vendee for damages to which each party would be exposed on a failure by the other to perform a contract made by one and binding on both, and that it did not apply to a contract made by one owner which contained a clause exempting him from liability for damages in case his co-owner failed to convey.—*McLean v. McLean*, 364.
17. Plaintiff agreed to print and deliver to defendant one hundred thousand pamphlets for \$400. He in fact printed and delivered ninety-seven thousand, three hundred and fifty. *Held*, That the delivery of the entire one hundred thousand pamphlets was, by the contract, made a condition precedent to plaintiff's right to recover, and that he could not recover in the absence of any waiver of such condition precedent for those actually delivered.—*Vickers v. Moore*, 370.
18. The general rule that a party who seeks to disaffirm his contract must restore whatever he has received under it does not hold where the other party has, by absconding, made such restoration impracticable.—*Johnson v. Frew*, 395.
19. When the only written evidence of the contract between the parties is a letter offering to do the work therein specified and described for a certain price, and an acceptance endorsed thereon, no time of payment being specified, in an action to recover the price agreed on, defendant may introduce parol evidence to show that it was part of the contract that he should have three months' credit, especially when the contract upon its face shows that it does not embody the whole agreement.—*O'Meara v. French*, 466.
20. When a contract has not been fully performed, a payment will imply no change in the contract or bind the party when the payment was made under a false statement of the facts or even a mistaken view of them. While it may be that the payment cannot be recovered back, such payment cannot be used as a basis for recovery upon the contract as if performed.—*Dauchy et al. v. Tutt*, 490.
21. Plaintiffs purchased steel rails at a specified price "f. o. b. (free on board), continental port; inspection at makers' works," payment by letter of credit. The letter of credit for the full amount of the rails was given but plaintiffs were obliged to pay for inspection. In an action to recover the amount so paid, *Held*, That the contract was not ambiguous, and could not be varied by parol evidence; that the words "free on board" and the provision for inspection were to be construed together, and that plaintiffs were only bound to pay the amount named.—*Silberman et al. v. Clark et al.*, 538.
22. Before a purchaser of land can successfully resist performance of his contract on the ground of defect of title there must be at least a reasonable doubt as to the vendor's title which affects its value and would interfere with a sale to a reasonable purchaser. A defect in the record title may be removed or cured by parol evidence.—*Hellreigel v. Manning*, 543.
23. One who agrees to sell and convey premises at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in repair or guard against natural decay.—*Id.*
24. The real estate of plaintiff having been sold on execution and the time for redemption by him having expired, he was induced to confess judgment to his mother, so that she could redeem for his benefit, she promising to convey to him on his paying said judgment. This she afterwards refused to



do. *Held*, That the agreement was not one for a sale of lands within the Statute of Frauds, but created as executory trust which could be enforced in equity.—*Wood v. Rabe et al.*, 558.

25. Defendants, being guarantors for the return of certain bonds to plaintiffs and being about to be sued on their guaranty, agreed with plaintiffs that if the latter would bring action against their principal and procure judgment, they, defendants, would take assignment thereof and return the bonds and pay the costs and expenses of the suit. *Held*, That such agreement was a valid, original agreement and was not within the Statute of Frauds.—*Beckwith et al. v. Brackett et al.*, 583.

See AGENCY, 7; COMMON CARRIERS, 1; CONSTITUTIONAL LAW, 2; CORPORATIONS, 15; DRAFTS; EXECUTORS, 18; FIRE INSURANCE, 1; LIMITATION, 2; MASTER AND SERVANT, 3; MUNICIPAL CORPORATIONS, 1; PATENTS; PLEADING, 2; USURY; WILLS, 27.

#### CONVERSION.

1. B., plaintiff's husband, on procuring the discount by defendant of the note of one D., deposited a bond owned by plaintiff as collateral. At the maturity of said note D. made a new note with which he renewed the former one without the knowledge of plaintiff. The second note not having been paid, defendant without notice to B. or plaintiff sold said bond and applied the proceeds on the note. *Held*, That defendant was liable for a conversion of the bond; that before retaining it on a new contract it should have required B.'s consent.—*Bur-nap v. The National Bk. of Potsdam*, 157.
2. Plaintiff and others built a trestle which defendant converted to its own use. Thereafter plaintiff procured an assignment of the interest of his associates in the property and then demanded possession of it of defendant, which was refused. He then brought this action for a conversion. At a Special Term the court found a conversion as of the date of the demand; *Held*, That the finding was proper and that the action could be maintained; that the former conversion did not affect the question of plaintiff's right of action.—*Serat v. The Utica, I. & E. R.R. Co.*, 196.
3. One owner in common of a crop of grain kept it in a barn to which his co-owner had access, and the latter demanded that the former clean and divide the grain, which was refused. *Held*, No conversion, even though the duty rested upon the co-tenant to do as requested.—*Thomas v. Williams*, 285.
4. In an action for the conversion of certain personal property belonging to a testator, an averment in the complaint that "under and by virtue of the laws of France, where the testator had his domicil, the title to all the

personal property of which said testator was possessed at the time of his decease vested immediately thereafter in the plaintiffs, the residuary legatees named in said will, their title being subject, however, to the payment of the particular legacies by said will bequeathed and of the annuities therein given," is sufficient to entitle the plaintiff to prove the laws of France, and is sufficient, as an allegation of title, to maintain the action.—*Berney et al. v. Drexel et al.*, 348.

5. An allegation in a complaint in an action of conversion that the defendant "converted" the property in question to his own use is an allegation of fact and is sufficient to admit of any evidence on the trial of issue joined that tends to establish such conversion, and plaintiff is not bound to allege the particular act or acts which constitute the conversion complained of.—*Id.*

See COMMON CARRIERS, 1; EXECUTOR, 21; PLEADINGS, 12, 13.

#### CORPORATIONS.

1. A public corporation should make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish; and owes the duty impartially to grant the right to all who comply with its rules to have the privileges furnished.—*Friedman et al. v. The Gold & Stock Tel. Co.*, 68.
2. By the assignment and transfer of the certificates of stock a purchaser obtains the entire legal and equitable title thereto and it is the duty of the corporation on receiving notice to make the transfer on its books, and a refusal to do so is wrong.—*Robinson v. The National Bk. of New Berne*, 113.
3. The requirement of a register of transfers is waived when the corporation wrongfully refuses to make it.—*Id.*
4. After such a refusal a subsequent transferee is not required to demand a transfer to him on the books to entitle him to maintain his right as a stockholder.—*Id.*
5. A stockholder, who claims that voluntary proceedings to dissolve a corporation are being taken by the directors in bad faith and for fraudulent purposes and with the intent to defraud him of his rights as such stockholder, is not entitled to a temporary injunction in an action brought by him to restrain such proceedings when the equities of his case are fully met and denied by opposing affidavits.—*Jewell v. Swann et al.*, 144.
6. All the questions raised by such an action can be fully presented in the proceedings taken to dissolve such corporation under §§ 2419-2431 of the Code of Civ. Pro., for such proceedings cannot go on without notice to the plaintiff in such action, and he can then come in and oppose the dissolu-

- tion upon any of the grounds upon which he seeks to restrain it in the action brought by him.—*Id.*
7. A corporation organized for the purposes of "collecting, storing and preserving ice, of preparing it for sale, of transporting it to the city of New York, or elsewhere, and of vending the same," is not a manufacturing corporation within the meaning of Chap. 542, Laws of 1880.—*The People v. The Knickerbocker Ice Co.*, 194.
8. A plaintiff is not estopped by the fact that he has introduced in evidence defendant's certificate of incorporation from showing that the subsequent steps necessary to perfect such incorporation had not been taken.—*Kruss v. Dusenbury et al.*, 201.
9. If a manufacturing corporation created under the laws of New Jersey has no office or place of business in that State and opens an office and transacts business in the city of New York, the incorporators are personally liable for all debts contracted in the corporate name.—*Id.*
10. Chap. 361, Laws of 1881, established a new system of taxation for corporations in this State, laying a tax for State purposes upon the franchise and no longer upon the capital.—*The People v. The Gold & Stock Tel. Co.*, 213.
11. This statute, however, does not apply to town and county taxes. It governs the rate of taxation for State purposes upon telegraph companies whose lines are built partly within and partly without the State, and Chap. 431, Laws of 1853, although un-repealed, must be deemed abrogated thereby.—*Id.*
12. The statute makes it obligatory upon a corporation to pay the State tax within a certain period, and if not paid the State may recover interest thereon from the time when the tax should have been paid. The penalty fixed for non-payment is not in lieu of interest.—*Id.*
13. In the absence of record evidence the acts of corporations may be proved by the testimony of witnesses, and even where no direct evidence of them can be given facts and circumstances may be proved from which they can be inferred.—*Morrill v. The C. T. Segar Mfg. Co.*, 233.
14. The omission to make an entry in the minutes of a private corporation of the proceedings of a particular meeting will not render such proceedings void nor preclude a party from showing what proceedings were had.—*Id.*
15. The officers at a regular meeting may bind the company in the matters of its business by special action in any way that shall be deemed advisable, notwithstanding its by-laws require contracts to be binding shall be made in a particular way and form.—*Id.*
16. An action against a trustee of a manufacturing corporation to enforce his statutory liability to creditors of the company by reason of a failure to fill an annual report does not survive the death of such trustee, and cannot be revived against his personal representatives.—*Stokes v. Stickney et al.*, 251.
17. Under 2 R. S., 6th Ed., § 9, an action or proceeding in favor of a corporation, pending at the time of its dissolution, does not abate by reason of such dissolution, but may be continued in the name of the corporation by a receiver of such corporation in an action to procure its dissolution.—*Platt v. Ashman*, 297.
18. The appointment, under the late bankrupt law, of an assignee in bankruptcy of a corporation after its dissolution did not abate such an action, but under the provisions of the said bankrupt law and § 121 of the Code of Procedure such assignee had the option either to continue the action in his own name or in that of the corporation.—*Id.*
19. What is sufficient proof of the existence of a foreign corporation as such.—*Snyder v. Bliss et al.*, 304.
20. The court which appoints the receiver of an insolvent corporation has authority, as an incident to the power of appointment, to prevent any interference with the assets of the corporation by individual creditors or others.—*The Phoenix Foundry & Mach. Co. v. The North River Construction Co.*, 439.
21. An annual report of a corporation signed by two trustees, and verified by one of them as acting vice-president, when the certificate of incorporation was signed by seven and acknowledged by nine trustees, does not satisfy the provisions of § 12, Act Feb. 17, 1848, in the absence of the evidence of official records showing the resignation of the president and secretary and of sufficient trustees to make the number signing the report a majority of the board.—*Westerfield et al. v. Rudde et al.*, 448.
22. The statutory certificate by the trustees of a corporation stated that the whole of the capital stock of the corporation had been paid up in full by the purchase of a certain described patent. In an action by a creditor of the corporation to enforce the statutory liability of the trustees for its debts, upon an allegation of the falsity of said certificate, &c., *Held*, That though said certificate in form followed the statute, the question of the value of the patent, and whether it was worth the amount of the stock, is material, and is a question for the jury.—*Bole et al. v. Ridder*, 468.

23. The delivery of a certificate of stock, with a power of attorney authorizing the person to whom such certificate is given to transfer to himself the shares represented by it upon the books of the corporation, will transfer the title to the shares to the person receiving these evidences of right without the formal transfer of such shares upon the books of the corporation; and if, before such transfer upon the books of the corporation, the shares are seized under an attachment issued in an action against the person in whose name they stand, such seizure gives the attaching creditor no right whatever to them, and forms no legal obstacle to the transfer of such shares upon the books of the corporation; and a refusal on the part of the corporation, on account of such attachment, to make such transfer, renders it liable for the value of the shares.—*Dunn v. The Star Fire Ins. Co.*, 531.
24. The fact that a certificate of stock is presented at the office of a corporation to a person apparently in charge of it, and a request made to him for the transfer of the shares upon the books to the person presenting such certificate, which request is refused by him, is sufficient, in the absence of evidence to the contrary, to warrant the conclusion, in an action to recover damages for such refusal, that he had the authority to represent the company and to bind it by such refusal.—*Id.*
25. Defendant, a foreign corporation, had an office for business in New York City, but little of its property was in this State and but little of its business done here. For the year ending November 1, 1881, it reported that no dividend had been made or declared, and filed an appraisal of its capital stock, upon which a tax of 1½ mills was laid. *Held*, That the tax was one upon the business of defendant done in this State, and was valid.—*The People v. The Equitable Trust Co.*, 537.
26. The authority of the Court to compel a receiver of the assets of a corporation to allow a creditor of such corporation to make extracts from the corporation books does not rest on the technical rights of a stockholder or creditor, as between himself and the corporation, under the statutes relating to corporations, but upon grounds of justice and equity in administering the trust in the hands of the receiver, and the granting or refusing an application for that purpose is within the discretion of the Court.—*In re application of Tiebout*, 570.
- See RECEIVERS, 1, 4-7; TAXATION, 6, 7.
- COSTS.
1. Where the question in controversy was the right of defendant to construct its road on the line located by it, the primary question being the value of the disputed franchise, proof was given of the amount expended on the located line and the increased cost of constructing on the line claimed by plaintiffs, but no proof as to the value of the franchise if undisputed. *Held*, That these facts could not furnish the measure of value and that no facts were presented which could serve as a computation upon which to predicate an extra allowance.—*The People v. The Genesee Valley Canal RR. Co. et al.*, 31.
2. A defendant may assign to his attorney the prospective costs against plaintiff in consideration of services to be rendered, and the claim of the attorney to a judgment for such costs cannot be defeated by setting off against the same a prior judgment in favor of plaintiff against defendant.—*Naylor v. Lane*, 50.
3. Where averments in the complaint before a justice of the peace make necessary the plea of title, upon which defendant finally succeeds, and plaintiff recovers 12 cents damages upon a cause of action not alleged in his complaint, *Held*, That defendant is entitled to costs.—*Falkel v. Moore et al.*, 58.
4. An extra allowance was awarded to defendant upon the discontinuance of the action by plaintiff, and defendant was thereafter awarded the damages sustained by him from the obtaining of an injunction by plaintiff, which damages the referee found to consist of the fees of the defendant's attorney, &c., for services in removing said injunction. Upon the coming in of the referee's report the court adjudged that what was given as an allowance should be applied to the payment of the damages from the injunction. *Held*, Error; there being nothing in the order for the allowance showing such an intent.—*Howell v. Miller*, 72.
5. Where defendant has amended his answer upon paying costs and finally succeeds in the cause, he cannot tax the costs so paid against plaintiff.—*The Seneca Nation of Indians v. Hawley*, 76.
6. Where a claim disputed by executors is referred under the statute, disbursements to the party prevailing on the reference are no longer a matter of right, but are in the discretion of the Court.—*Miller v. Miller et al.*, 145.
7. Where the charter of defendant, Ch. 150, Laws of 1872, provided for the appointment of a treasurer, and the latter made affidavit that he was the chief fiscal officer of the city and that the claim in suit had never been presented to him, *Held*, Under Code, § 3245, that plaintiff was not entitled to costs, although he had presented his claim before action to the Mayor and Common Council, who had, by said charter,

authority to adjust the same.—*Dressel v. The City of Kingston*, 172.

8. The general rule that in an action to obtain the construction of a will costs will be charged upon the general estate if the will is so drawn as to create doubt and render resort to a court necessary or advisable only relates to a question affecting the administration of the entire estate, and has no application to a case in which a particular share only is involved in doubt.—*Cook et al. v. Munn et al.*, 898.
9. In an action brought by the executors to ascertain who is entitled to a particular share of an estate, making the persons claiming such share defendants, but to which the other persons interested in the estate are not parties, only the costs of the executors will be paid out of the general estate. The other parties must pay their own costs out of their shares of the estate.—*Id.*
10. Where defendant proceeds to trial without applying for security for costs from plaintiff, he thereby waives his right in that regard.—*Fitzsimmons v. Curley*, 499.
11. To compel plaintiff to give security for costs on the ground of non-residence, it must be shown that when the action was begun he was a person residing out of the State, Code, § 3268, or that he ceased to be a resident of the State after the commencement of the action. § 3269.—*Id.*

See APPEAL, 18; ATTACHMENT, 11; DIVORCE, 7; EXECUTORS, 2; TRUSTS, 4.

#### COUNTERCLAIM.

See PLEADING, 1.

#### COUNTY COURT.

1. On a new trial in county court on appeal from a justice's judgment the case should be tried on the issues formed in the justice's court.—*Becker v. Barnum*, 94.

#### COUNTY TREASURER.

See TAXATION, 1.

#### COVENANTS.

See DEEDS, 6, 7; LEASE, 3, 5; MORTGAGE, 1.

#### CREDITOR'S ACTION.

1. Judgment creditors who seek by their complaint to remove a fraudulent obstruction must show that such removal will enable the judgment to attach upon the property, and where the debtor has made a valid general assignment for the benefit of creditors the assignee should be joined as defendant to the complaint.—*Lovely et al. v. Clinton et al.*, 191.

Vol. 10—No. 25b.

2. When a mortgage made by a deceased person in his lifetime has been foreclosed and a judgment of deficiency entered against his executors, the mortgagee cannot maintain an action against grantees of such deceased person to set aside the conveyances to them as fraudulent without the previous issuance of an execution on his deficiency judgment against said executors, although such executors have no property of the estate in their hands out of which such execution could be satisfied.—*Lichtenberg v. Herdtfelder et al.*, 884.

3. The fact that the property sought to be reached by creditor's bill is owned by the judgment debtors in severalty is no ground of objection to joining them all as defendants.—*Bradner et al. v. Holland et al.*, 868.

4. A judgment creditor, an execution upon whose judgment has been issued and returned unsatisfied, may maintain a creditor's action against the wife of his judgment debtor to recover a debt owing by her to him for services performed by him in her employment, in her separate business.—*Kingman v. Frank et al.*, 554.

5. It seems that the husband himself, or his assignee, could maintain an action against his wife to recover said debt.—*Id.*

See RECEIVERS, 7.

#### CRIMINAL LAW.

1. Where the sentence of a prisoner is alleged to be incorrect the remedy is by appeal from the judgment and not by writ of habeas corpus. Upon such appeal the appellate court can correct the sentence if erroneous.—*The People ex rel. Devos v. Kelly*, 205.

2. *It seems*, that for an assault in the third degree the prisoner cannot be imprisoned in a State prison, but must be sent to a penitentiary or county jail.—*Id.*

3. Upon the trial of an indictment under § 817 of the Penal Code for selling obscene and indecent pictures, the question as to whether the pictures are indecent and obscene is a question to be determined by the jury from an inspection of the pictures, as one person is as competent to determine such a question as another.—*The People v. Muller*, 256.

4. Upon such trial the exclusion of evidence of the sale by other persons, and the exhibition elsewhere of pictures of a somewhat similar character is proper, as such evidence is immaterial.—*Id.*

5. After the passage of Chap. 860, Laws of 1882, a Court of Oyer and Terminer constituted under the former law was unauthorized even for the purpose of pronouncing sentence on affirmance of a conviction had prior to the passage of the law of 1882,

and a sentence passed by a court so constituted is invalid.—*The People v. Bork*, 281.

6. The provisions of § 962, Code Crim. Pro., do not refer to the organization of criminal courts, but to the procedure therein.—*Id.*

See APPEAL, 18; ARSON; ASSAULT; CONSTITUTIONAL LAW, 4; FALSE PRETENCES; FORGERY; MURDER; OBSCENE PICTURES; PECULATION.

### DAMAGES.

See CIVIL DAMAGE ACT, 3; EXECUTORS, 21; FALSE IMPRISONMENT, 1; INJUNCTION, 4, 5; LEASE 3-5, 7, 8; NEGLIGENCE, 19, 35; PRACTICE, 20; RAILROADS, 7.

### DECEIT.

1. In an action to recover damages for fraudulent misrepresentations, where the complaint charged that defendant misrepresented that his father and principal, in whose name the goods were purchased, was perfectly solvent and would pay all his indebtedness in full, but that most of his money was tied up for the moment in margins advanced to bankers for carrying stock, and the proof at the trial was that defendant represented that the house for which he acted was all right and would take care of its contracts, and it was only on account of the rush for margins made on the part of the bankers that the purchaser was prevented from paying at once, *Held*, That the variance between the misrepresentation charged in the complaint and that shown by the evidence was not fatal, and as the variance was not shown to have misled defendant it should be disregarded under § 539 of the Code.—*Gossler et al. v. Lissburger*, 291.
2. To sustain an action for damage for fraudulent misrepresentations by which plaintiff was induced to sell goods on credit, it must appear as an element that defendant knew or had reason to believe that his statements were false, or defendant must have falsely conveyed the impression that he had actual knowledge.—*Id.*

### DEEDS.

1. A deed describing the lands conveyed as bordering on a river beginning at "low water mark," thence to a point one rod from the brink of the river; thence by different courses to the river, and as it winds and turns to the place of beginning, does not embrace any portion of the river, but only lands bordering on it.—*Bloomington v. Sherman*, 30.
2. Where at the time of conveying land by deed there are fences upon the premises, but no reference is made to them as monuments in the deed, the land being described by metes and bounds and number of acres, the courses and distances and quantity as therein given will control in determining the rights of the parties under the conveyance.—*Robinson v. Robinson*, 188.
3. If the grantor has no title to a portion of the land embraced within the lines of the description, the grantee may recover for the deficiency of quantity in an action upon the covenant of warranty.—*Id.*
4. Whether simultaneous conveyances of lands by two persons to each other were intended as sales for money or as a mere trade or exchange of lands is a question of fact for the jury.—*Stebbins v. Breese*, 261.
5. A statement in a deed of a sale for a named consideration duly paid is an admission in writing by the grantor and *prima facie* evidence that the premises were sold for the price named, and that he had been paid such sum on the sale.—*Id.*
6. A grantee in a deed who has never accepted it or exercised any acts of ownership over the property conveyed is not bound by a covenant therein to pay a mortgage on such property.—*Kelly et al. v. Geer*, 278.
7. A husband purchased property which he caused to be conveyed to his wife and son subject to a mortgage, the deed containing a covenant to assume and pay said mortgage. The wife knew nothing of the deed, had no possession or control of the premises, and received none of the rent. She subsequently joined with her son in a quitclaim deed. *Held*, That she did not thereby ratify the prior transactions and was not liable on the covenant.—*Id.*
8. Where premises adjacent to a road were conveyed by the owner of the fee by the following description: "Beginning at the corner formed by the intersection of the easterly line" of the road "with the northerly line" of another street, and terminating "thence along the easterly line" of said road to the place of beginning, etc., *Held*, That the land conveyed was not bounded by the centre of the road, but by its side, and that a different intention does not appear from the fact that the deed also designates the property by numbers upon a certain map which represents the property as abutting upon the road.—*Mead v. Riley*, 340.
9. A condition subsequent in a deed may be excused when its performance becomes impossible by the act of the party for whose benefit it is created, or it may be waived by the one who has a right to enforce it.—*Wheeler v. Dunning et al.*, 330.
10. A deed from the city of New York granting land under water extending southerly from the middle of Thirty-fourth street, as it was laid out, into the Hudson River, on a certain map of lands under water, and extending westerly to the ex-

terior line of N. Y. city, as it was laid out on said map, together with all wharfage, etc., growing from that part of the exterior line of said city lying on the westerly side of the lands so granted, contained the following reservation clauses: "Saving and reserving from and out of the hereby granted premises so much thereof as forms part or portions of the Thirteenth avenue and Thirty-fourth street, for the uses and purposes of public streets," and "excepting such wharfage, etc., to grow from the westerly end of the bulkhead in front of the entire width of the  $\frac{1}{4}$  part of Thirty-fourth street which shall be and hereby is reserved for the city of N. Y." *Held*, That the city reserved the fee of the lands composing Thirty-fourth street, and all the wharfage accruing from the use of any pier to be built within the boundaries of Thirty-fourth street, and the right to use the navigable waters on the south side of such pier until the same should be lawfully occupied by other piers.—*Coffin v. Scott et al.*, 418.

11. Where the grantor in 1871 conveyed certain premises by full covenant warranty deed, in which they were described as bounded by the side of Bloomingdale road, which had been before and then was legally closed as a public highway, said deed also conveying all the right, title and interest, if any, of the grantor, in so much of the road as was adjacent to the premises, and in 1880 an award for damages for closing said road is made, said award is the property of the grantor and does not pass under the deed.—*King v. Trustees of St. Patrick's Cathedral*, 501.

See CLOUD ON TITLE, 4, 5; CONTRACT, 4; EASEMENT; ESTOPPEL, 1; EXECUTORS, 10, 11; FRAUD, 2-4, 12, 18; TRUSTS, 5.

#### DEFENSE.

See ASSESSMENTS, 4, 8; FIRE INSURANCE, 3, 6; LIFE INSURANCE, 5; SHERIFFS, 10; USAGE, 2.

#### DEMURRER.

See PLEADING, 7.

#### DEPOSITIONS.

1. Under the Code the plaintiff is entitled to an order for the examination of one of two defendants to prove a copartnership between the latter.—*Goldberg v. Roberts*, 208.

2. An order for the examination of a defendant before trial in an action to recover possession of goods sold to defendants, the sale and possession of which are alleged to have been fraudulently obtained by defendants, will not be refused upon the ground of defendant's privilege when the object of the examination is to ascertain the quantity of goods that came into defendant's hands, the time when they re-

ceived the same, the time of making the sale and delivery of the same by them to another party, and the quantity delivered to him, &c.—*The Davenport Glucose Co. v. Taussig et al.*, 328.

3. The fact that questions may be put on such an examination which the defendant may be privileged from answering is not a reason for holding that he cannot be examined at all.—*Id.*

4. Section 872, Code Civ. Pro., does not sanction the granting of an order before the commencement of an action for the examination of the defendant in an expected action when such examination is professedly sought for the purpose of securing information upon which a complaint against him might be framed, and when there is no obstacle in the way of the plaintiffs in such expected action immediately commencing it, and no necessity is shown for taking the examination of the expected defendant in order to perpetuate his testimony.—*In re Morris et al. v. Matthews*, 375.

5. The provisions of § 880 of the Code, requiring that the depositions of a party examined before trial shall, when completed, be carefully read and subscribed by the person examined and certified by the judge or referee taking it, and also within ten days thereafter be filed in the office of the clerk, is a provision for the benefit, so far as the requirement that the deposition shall be filed, of the party examined, and the provision requiring the deposition to be filed may be waived by the party examined, and is waived by his accepting and assenting to a stipulation leaving the examination open for his further cross-examination on two days' notice to the opposite party. And it is error for the trial court under such circumstances to exclude the deposition as evidence for the reason that the same was not filed in the office of the clerk under the provisions of § 880 of the Code, *supra*.—*Mayer et al. v. Ehrlich et al.*, 376.

6. An order to authorize an order for the examination of a party before trial, under § 870 of Code, an affidavit must be presented showing the facts making the testimony material and necessary for the party making the application. An affidavit stating that the testimony of such party "is material and necessary to deponent for the prosecution of this action, and in order to avoid the deponent's being surprised on the trial of this action by unexpected testimony" from the said party, is insufficient.—*Wallace v. Wallace*, 495.

7. The rule applicable to the granting of an examination of a party before trial in a case involving matters which might subject the party examined to a criminal prosecution is, that where it clearly appears that the only material evidence in the case that can be called out from the party sought to

be examined beneficial to the other party must of necessity tend to establish his criminal guilt the Court will not require examination before trial, but where it appears that any testimony material to the case may be given which has not of necessity that tendency the examination may be had, leaving the party to assert his privilege if he chooses not to answer such questions as have that tendency.—*The Mechanical Orguettes Co. v. Haynes et al.*, 585.

8. In an action in which several of the defendants are charged with having obtained property by means of a fraudulent conspiracy, an examination before trial of a defendant to whom it is alleged that such property was transferred with notice or knowledge of such conspiracy, and without consideration, as to such notice or knowledge and the consideration paid by him, is proper.—*Id.*
9. Section 910 of the Code of Civ. Pro., merely permits the court, on motion, to suppress the deposition of a witness for certain reasons, and does not require it to do so when the personal attendance of the witness can be secured, and it contemplates a special motion for that purpose, in the hearing of which all the facts may be brought before and considered by the court, and does not permit the party to proceed to the trial, and then, for the first time, present the application as a legal point to be ruled upon in the course of the hearing.—*Hodges v. Williams*, 556.
10. A deposition taken conditionally within the State cannot be read if the personal attendance of the witness can be secured, while a deposition taken out of the State can be read under such circumstances, unless it has been suppressed by an order made for that purpose.—*Id.*

#### DISCONTINUANCE.

See EXCISE, 1, 2.

#### DISCOVERY.

1. In an action brought by a principal against his agent for an accounting of the transactions of the agency, where the principal has kept no account of such transactions but relied upon those of the agent, and alleges that he has been defrauded by such agent, and where the relation of agency was of such a character as rendered it the duty of the agent to keep accounts of the transactions of the agency, a discovery of the books of the agent will be ordered to enable plaintiff to prepare for trial.—*Duff v. Hutchinson et al.*, 20.
2. When the accounts for the discovery of which an application is made are of extensive transactions and time is necessary for their examination and consideration and the proper preparation of the case for trial,

the fact that the books containing them can be procured at the trial by means of a *subpoena duces tecum* will not defeat the application for a discovery.—*Id.*

3. The fact that a discovery of the agent's books may establish the fact that he has been guilty of misconduct in his dealings with his principal is no answer to an application for such a discovery.—*Id.*

#### DISORDERLY PERSONS.

1. Certiorari is the proper mode of review of the decision of a magistrate in a proceeding against a disorderly person for abandoning his wife, under § 899 of the Code of Criminal Procedure.—*The People ex rel. Scherer v. Walsh*, 511.
2. Such a proceeding is not a criminal action as defined in that Code, and the Justice before whom it is brought sits as a magistrate and not as a Court of Special Sessions. No appeal is given in such proceedings.—*Id.*
3. On the hearing, the fact that the wife left the husband's domicile is not decisive of the question of abandonment, but the wife may show that she had reasonable cause to leave, and if it appears that it was unsafe for her to remain in the house with him, because she was in imminent danger of suffering personal violence at his hands, her case is made out, and it is therefore error on the part of the magistrate to exclude such testimony.—*Id.*

See UNDERTAKING, 6.

#### DIVORCE.

1. A party in default may be punished for contempt for failure to pay alimony adjudged by a decree of divorce, but as a foundation to such application the party in default should be served with a certified copy of the decree and payment of the alimony demanded.—*Ryckman v. Ryckman*, 41.
2. Execution cannot properly issue to recover alimony decreed to be paid by a judgment in an action for divorce, but can only issue for costs of the action.—*Id.*
3. Charges of adultery on the part of the defendant have no place in a complaint which prays for a decree of separation and will be stricken out on motion.—*Allen v. Allen*, 212.
4. Allegations in such a complaint of frequent intoxication and of filthy habits on the part of defendant are appropriate to the charge of cruel and inhuman treatment and will not be stricken out.—*Id.*
5. An allegation in such a complaint that defendant had appropriated about \$3,000 worth of property belonging to plaintiff and refuses to return it is appropriate to

the question of the amount of alimony and will not be stricken out.—*Id.*

6. A third person, not a party to a divorce suit, cannot intervene or apply by petition to have the decree granted in such suit vacated on the ground that it was collusively and fraudulently obtained.—*Simmons v. Simmons*, 284.
7. On the dismissal of such a petition the court may impose costs against the petitioner, although it may finally be held that the court was without jurisdiction of the subject matter; but it has no authority to impose upon the petitioner the payment of a specific sum in gross as compensation to the opposing party for disbursements and counsel fees.—*Id.*
8. Where all the facts upon which plaintiff's right of action for a limited divorce is based are denied and the preponderance seems to be in favor of defendant, the husband, the court should not award alimony *pendente lite* without at least sending the matter to a referee to determine as to the disputed facts, but the granting of counsel fee is proper, it satisfactorily appearing that plaintiff is without means to prosecute her action.—*Brennan v. Brennan*, 342.

See CONTEMPT, 8-10.

#### DOWER.

1. The filing, in an action for the admeasurement of dower or for a sale of the premises and the awarding of a gross sum in lieu thereof, of a consent in writing to receive a gross sum in lieu of dower, etc., pursuant to the statute, does not give the plaintiff such a vested right in such unascertained sum that, in the event of her death before the entry in the action of an interlocutory judgment determining her right of dower and adjudging a sale of the premises, the suit can be carried on by her personal representatives to ascertain the amount of and to recover such sum. In such a case the action abates on the death of the widow.—*McKeon et al. v. Fish*, 402.
2. It seems that the action might survive if the right of dower had been determined and a sale of the premises adjudged before the death of the plaintiff.—*Id.*
3. When a man who has been previously married, but who has not heard for five successive years that his wife is living, marries a second time, and it is subsequently discovered that his first wife was living at the time of his second marriage, and, in an action brought for that purpose, such second marriage is decreed to be void from the time of entering the decree, and the man subsequently dies, his second wife is entitled to dower in the real estate of which he was seized at the time between his second marriage and the entry of the decree declaring it void.—*Price v. Price*, 427.

4. It is only where the decree annuls the marriage from its solemnization that it is attended with the effect of depriving the wife of her right to dower in the property owned by her husband during the existence and continuance of the marriage.—*Id.*
5. Cases may arise under the law as it is now administered in this State where two or more persons may be entitled to dower in the same estate.—*Id.*

See WILLS, 41.

#### DRAFTS.

1. An order drawn by a contractor on the owner of the building, payable when certain work is completed, and accepted by such owner, is not a bill of exchange, but only operates as an assignment of what would become due to the contractor, or as a contract on the part of the owner to pay the sums mentioned in the order and on the terms specified.—*Duffield v. Johnston*, 254.
2. Before the specified work was completed the contractor became unable to perform, and the contract was cancelled. *Held*, That as to the payments which were to be made after such work was completed the order never operated as an assignment, and that defendant, the owner, lost no right by cancelling the contract.—*Id.*

#### DRAINAGE.

1. The power to remove a commissioner appointed by a county judge under chap. 888, Laws of 1869, as amended by chap. 303, Laws of 1871, for good cause shown is incident to the power of appointment.—*In re petition of Underhill*, 282.

See NUISANCE.

#### EASEMENT.

1. One H. granted certain lands to defendant's grantor, together with the exclusive right to take ice from H.'s pond and the right of access for that purpose to and from the pond, in consideration whereof A. was to furnish H. and his grantees all the ice necessary for their family use. *Held*, That the right to take the ice was an easement attached to the dominant estate and appurtenant thereto, and would pass under a deed transferring the land with its appurtenances, and that H. and his grantees had no right to destroy the dam or prevent its necessary repair.—*Huntington v. Asher*, 519.

#### EJECTMENT.

1. A defendant in ejectment cannot recover for improvements made by him after express notice of plaintiff's claim and after he has claimed to hold in exclusion of it.—*Henderson v. Scott*, 255.



2. Conveyance of the whole premises by a tenant in common of a portion thereof to a grantee who claimed to own the whole under that deed, was an ouster of plaintiff, who claims one undivided seventh.—*Id.*
3. The plaintiff in whose favor judgment in ejectment was rendered went into possession of the premises, and said judgment was affirmed by the General Term. Afterwards the Court of Appeals reversed the judgment and ordered the complaint to be dismissed, and such judgment was made the judgment of this court, but no provision was made therein for restitution. *Held*, That it was within the general power of the Special Term to issue a writ of possession.—*Carleton v. The Mayor, &c., of N. Y.*, 354.

See STAY, 3.

### ELECTIONS.

See CONSTITUTIONAL LAW, 9.

### EMBEZZLEMENT.

See GUARDIANS, 8.

### EMINENT DOMAIN.

1. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use intended of the structures to be built on the property will tend incidentally to benefit the public by affording additional accommodation for business, commerce, &c., is not sufficient to bring the case within the operation of the right of eminent domain so long as the structures are to remain under private ownership and control and no right to their use or management is conferred on the public.—*In re application of the Eureka Basin Warehouse, &c., Co.*, 179.
2. The court will inquire into the regularity of the proceeding leading to even the second report of commissioners, and will set such report aside for fraud or misconduct.—*In re application of the B., N. Y. & P. RR. Co. v. McIntosh*, 189.
3. Certain acts of commissioners held irregular, and their report set aside.—*Id.*
4. Plaintiff's land was taken by the State for a canal, the benefits conferred on the owners being estimated by the appraisers to exceed the damages sustained. Subsequently the State released said lands to the city of B., and authorized it to use the same as a public street. This was done, plaintiffs being compelled to pay large assessments and their remaining property being damaged by the improvement. *Held*, That plaintiffs were concluded by the appraisal made and that the State was not liable for damages alleged to have been sustained by reason of the abandonment of the canal; that its release to the city was only of such

title or interest as the State had in the premises.—*Whitney et al. v. The State*, 323.

5. The estate acquired by the village under proceedings to take lands instituted pursuant to Chap. 101, Laws of 1881, as amended in 1882, is a fee in the land so taken.—*In re application of the Water Commissioners of Amsterdam*, 361.
6. In such proceedings the commissioners rejected evidence offered to show the fair market value of the remainder of the owner's farm after the strip described was taken therefrom, and allowed evidence as to the value thereof after taking therefrom the permanent right or easement to enter upon said strip to lay conduit and to enter thereon to make repairs. *Held*, Error.—*Id.*

See CONSTITUTIONAL LAW, 7, RAILROADS, 8, 9; VILLAGES.

### ESTOPPEL.

1. One Dorman in 1861 made a general assignment and made plaintiff a preferred creditor. The assignee, as such, paid out more money than the value of the real and personal estate and paid all D.'s debts except plaintiff's. The assignee took possession of the real estate and remained in possession until 1878. In 1876 he deeded the real estate to the defendant Bell, to whom he was indebted. Plaintiff knew this conveyance was to be made, and was present when it was made, but made no objection and asserted no claim. She had lived on the premises from 1865 to 1878, and was related to Beller and Dorman. In an action by her to assert her claim as a preferred creditor and to have said deed set aside, *Held*, That she was estopped.—*Flint v. Bell et al.*, 267.
2. Defendant, a married woman, was accommodation endorser on a note which plaintiff purchased in reliance upon answers in writing made by her to questions propounded, in which she stated that if the note was not paid she considered it incumbent on her to pay the same, and that her private estate was bound therefor. *Held*, That the answers amounted to an agreement, binding on her separate estate, which estopped her from denying that her separate estate was bound.—*Knowles v. Toone*, 523.

See ACCORD; EXCISE, 2; FIRE INSURANCE, 8; TRUSTS, 3; VILLAGES, 5.

### EVIDENCE.

1. Mere charges or accusations or even indictments against a witness cannot be inquired into for the purpose of discrediting him, but the inquiries must be as to specific facts which tend to discredit him or impeach his moral character.—*The People v. Irving*, 7.

2. In an action brought by one claiming title to goods through a transfer from a deceased person against a sheriff who has levied on the goods by virtue of an execution against deceased, the plaintiff cannot testify in his own behalf as to what took place between himself and deceased at the time of the transfer.—*Taylor v. Meldrum*, 25.
3. The reception in evidence against a party to a civil action of an answer given by him upon examination in supplementary proceedings, *Held*, No error.—*Baker v. McLoughlin et al.*, 29.
4. A party may contradict the statements of his own witnesses as to particular facts.—*Id.*
5. The original summons may be received to supply defects in a justice's docket.—*Id.*
6. In an action of foreclosure where the defence was usury, defendant's agent was allowed to testify to a conversation between himself and defendant prior to the loan, in the absence of plaintiff, tending to show that defendant contemplated making an usurious transaction. *Held*, Error.—*Cuddeback v. Sherman et al.*, 86.
7. Evidence as to what took place between plaintiff and defendant's agent while the latter was engaged in the execution of his agency was offered on the question of usury and excluded. *Held*, Error.—*Id.*
8. A mere averment in an answer that a certain person, who is not a party to the action, is interested in the result is not sufficient to make such person an incompetent witness as to transactions with a deceased party under § 829, Code of Civil Procedure.—*Wilson v. Munnoz*, 75.
9. The opinion of a witness as to a person's financial standing is inadmissible; the facts must be shown.—*York v. The People*, 104.
10. In an action upon a promissory note against the personal representative of the maker the testimony of plaintiff as to why he borrowed money of deceased instead of asking for it as a payment on the note relates to a personal transaction within § 829, and is not rendered admissible by the introduction in evidence of the testimony of deceased in another action which does not refer to said loan.—*Wood v. Holmes*, 121.
11. In an action by attorneys to recover for services the defense was that defendant was not to pay except in case of success and proof of a conversation to that effect with one of the plaintiffs was given. Plaintiffs offered to prove that the other plaintiff was a partner and that no such conversation took place, which offer was rejected. *Held*, Error.—*Judd et al. v. Buskin*, 123.
12. A party is not bound to interrupt the examination of a witness as to a material matter on a mere suspicion that a witness is debarred by his position from testifying, but if on cross-examination it appears that the witness is incompetent a motion to strike out the objectionable testimony may be made.—*Loveridge v. Hill et al.*, 175.
13. One P. testified to certain declarations made by defendant. On cross-examination it appeared that they were made to P. as counsel. *Held*, That they constituted a privileged communication as to which P. was debarred from testifying and that refusal to strike out his evidence was erroneous.—*Id.*
14. A party who cross-examines a witness on a collateral and immaterial issue is bound by the answer of the witness and cannot afterwards call witnesses to contradict him on such issue.—*Hilsley v. Palmer et al.*, 209.
15. On a trial for murder where the defence was insanity certain papers showing the prisoner's motives for the crime were introduced in evidence. It was proved that these papers were found on the prisoner's person when arrested, and that he declared that he wrote them for the purpose of having them found in case he was arrested. *Held*, An abundant identification of the papers.—*The People v. Jefferson*, 217.
16. The answer set up as a counterclaim an account against plaintiff's father, which, it was alleged, plaintiff had agreed to pay in consideration of the conveyance of certain property by the other heirs. *Held*, That defendant was not an incompetent witness under § 829 of the Code to prove such indebtedness.—*Stephens v. Cornell*, 306.
17. The question as to whether a claim is barred by the statute of limitations is not to be passed upon in receiving or rejecting evidence to establish the original existence of the claim.—*Id.*
18. In an action brought against the executors of a deceased person to recover the proceeds of certain bonds alleged to have been deposited with such deceased person in his lifetime for the benefit of plaintiff, the plaintiff is prohibited by § 829 of the Code of Civ. Pro. from testifying in her own behalf to facts showing the delivery by her of such bonds to the said deceased person.—*Price v. Price et al.*, 331.
19. Under said section the plaintiff in such an action is precluded from testifying in her own behalf to a conversation taking place in her presence between the deceased and a third person and especially if she participated in any part of such conversation.—*Id.*
20. In an action on a promissory note the borrower testified that the loan was procured from plaintiff through the agency of S., and testified to conversations occurring

between himself and S. at the time of procuring the loan. Plaintiff subsequently testified that the transaction took place directly between the borrower and herself, and thereupon the evidence of the conversations between the former and S. were stricken out by the referee before whom the action was tried as not having been connected with plaintiff. *Held, Error.—Schell v. Cockcroft, 377.*

21. In an action upon a firm note evidence as to what entries the bookkeeper made in relation to the loan or his opinion as to what he would have entered had he understood the transaction differently are immaterial. — *Williams v. Burton et al., 399.*

22. In an action to recover money paid to persons employed by plaintiffs, under the authority of defendant, to perform work for the latter, the bills furnished by such persons and paid by plaintiffs are competent evidence to show the amounts alleged to have been paid out by plaintiffs. — *Kediam et al. v. Hoyt, 406.*

23. A stipulation that either party may read the testimony of the witnesses given in a former action with the same effect as though they were personally present and examined applies only to such testimony as is competent and material to the issues in the second action. — *Garrwood v. The N. Y. C. & H. R. RR. Co., 416.*

24. A physician is not allowed to disclose information acquired while attending a patient professionally. — *Ferguson v. The Massachusetts Mut. Life Ins. Co., 424.*

25. Where a party is examined in his own behalf in respect to a transaction with a deceased party the adverse party is permitted to testify concerning the same transaction under § 829 of the Code, not only as to that part of the transaction so testified to, but as to any fact concerning such transaction. — *Kelley v. Burroughs, 478.*

26. A letter written long after a transaction, stating the facts relating to it and the agreement of the parties, is a mere declaration of the writer in his own behalf, and is not admissible. The silence of the party addressed cannot be considered as an admission of the truth of the statements in the letter. — *Learned v. Tillotson, 545.*

See AGENCY, 2, 3; ARSON, 2; ASSAULT, 1, 3, 7; CLOUD ON TITLE, 5; CONTEMPT, 6; CONTRACT, 12, 19, 21; CONVERSION, 4, 5; CORPORATIONS, 8, 13, 14; CRIMINAL LAW, 3, 4; DEEDS, 5; DEPOSITIONS; DISORDERLY PERSONS, 3; EMINENT DOMAIN, 6; FORGERY, 2; FRAUD, 17; LEASE, 5; LIFE INSURANCE, 6; NEGLIGENCE, 2, 19, 21-23, 31; NEGOTIABLE PAPER, 1, 6; PARTNERSHIP, 4, 9, 11; PLEADING, 20; SHERIFFS, 9; SLANDER, 2; TRESPASS, 2, 5; TRUSTEES, 2; WILLS, 15.

## EXCISE.

1. An Overseer of the Poor has the right to make a motion to discontinue a proceeding brought by others in his name to recover penalties for violation of the excise law. — *Rodgers v. Coyle et al., 120.*

2. Where complaint is made to the overseer of violations of the excise law accompanied by the proofs thereof, and he refuses to bring the necessary actions or examine the proofs, he thereby waives the production of further proofs, and is estopped from questioning the sufficiency of the complaint or proofs, and his motion to discontinue a suit brought by the complainants in his name should be denied. — *Id.*

3. Evidence that liquors were sold in a building owned by defendant is insufficient to establish a cause of action for violation of the excise law where it appears that the store in the building was carried on by defendant's son, who sold the liquor, and it does not appear that defendant had any interest in the store or that the son acted as his agent. — *Ripley et al. v. Little, 165.*

## EXECUTION.

1. When a chattel mortgage reserves a right of possession to the mortgagor until demand of the debt secured, such mortgagor has an interest in the chattels which may be levied on and sold. — *Lyman et al. v. Bove, 22.*

2. An attorney who has issued an execution has no right to countermand it after a sale of real property has been made under it but before a certificate of sale has been issued to the purchaser. — *Thomas et al. v. Bogert et al., 396.*

3. A general execution issued on a judgment in an action in which an attachment has been granted is voidable only, and the judgment debtor alone is entitled to take advantage of the defect. — *Id.*

4. When real property is struck off to a purchaser on an execution sale the sale is complete, and the right of the judgment debtor to redeem springs immediately into existence. — *Id.*

5. Where the complaint alleges a breach of a contract, and as a conclusion thereto the conversion of the property forming the subject of the contract, and judgment is taken in default of appearance, the findings following the complaint, no execution against the person can issue, an order of arrest not having been obtained. — *Sherwood v. Pierce, 503.*

6. Or it may be held that the allegation as to conversion is mere surplusage, and the action is to be deemed one not authorizing a judgment upon which an execution against the person can issue. — *Id.*

7. In an action on contract in the district courts of New York City, where an order of arrest upon facts extrinsic to the cause of action, and shown by affidavits, has been granted and has not been vacated, plaintiff need only prove his money demand to sustain his case, and is entitled to a judgment with a direction therein subjecting defendant's person to execution.—*Stern v. Moss*, 528.

See ARREST, 1; CHATTEL MORTGAGE; CLOUD ON TITLE, 6; DIVORCE, 2; REDEMPTION, 2; SHERIFFS, 3, 4.

### EXECUTORS.

1. On a former appeal the executors A. and B. were held liable for advances made to C., their co-executor, up to a certain date, in excess of his share, to which they had consented, but not for receipts by him after that time, to which they had not consented, and that they should be credited with C.'s share as of the date of the accounting. On appeal from decree readjusting the account, *Held*, That the share of C., as ascertained, should be applied on the portion of this indebtedness for which the other executors were held liable; that in ascertaining the value of such share C. should be credited with the same share of the assets as is credited to the other beneficiaries, and that payments made by him after the date specified should be applied against receipts by him after said date.—*Adair et al. v. Brimmer et al.*, 59.

2. Costs incurred after the date of the accounting and commissions thereafter fixed should not be deducted from the amount ascertained to be in the executors' hands for distribution where it appears that there is other property to be subsequently accounted for.—*Id.*

3. By the will of testator the executors were directed to divide the residue of the estate, invest it and apply the income for the benefit of testator's children. A subsequent clause authorized the executors to lease the real estate, receive the rents and after the decease of the widow to sell the same for such prices, &c., as they should deem best for the interest of the estate. *Held*, That the executors were not liable for a failure to sell the real estate before the death of the widow.—*Hancox v. Meeker*, 90.

4. Where it appeared that the executors have, since the death of the widow, in good faith, made diligent efforts to sell, and that some of the real estate produces a large income, and there is no proof of unreasonable delay or of a refusal of a fair price, *Held*, That no such mismanagement is shown as would make the executors chargeable with expenditures incurred by reason of the delay in the sale.—*Id.*

5. The use of plate glass is not of itself evi-

dence that it was unnecessary as being beyond ordinary repairs.—*Id.*

6. Where a settlement is made annually by a trustee with the *cestui que trust*, with the assent of the parties interested, he may properly retain commissions on the annual income.—*Id.*

7. The surrogate possessed the inherent power to appoint a guardian *ad litem* to protect the interests of infants on an accounting of executors before the enactment of Chap. 156, Laws of 1874, specially conferring such power upon him; and, if no such guardian for an infant interested in the estate was appointed on such an accounting had previous to the passage of said act, the decree made thereon is irregular as to such infant, and he can disaffirm the same and apply for its reconsideration after attaining the age of 21 years.—*In re accounting of Tilden's ests.*, 128.

8. On the application of a person interested in an estate to open decrees made upon various accountings of the executors had during the minority of the applicant, such decrees will be opened and a rehearing of such accountings ordered so far as they affect the petitioner if it appears that no proper investigation of the executor's account was made by the special guardians appointed to protect his interests on such accountings, and that charges of questionable propriety were made against his share of the estate by the executors and allowed by the decrees.—*Id.*

9. It is no answer to such an application that the sums for which the said charges were made were paid to the applicant's testamentary guardian and receipts therefor taken from such guardian.—*Id.*

10. Where a will gives executors power to sell and convey real estate they are not thereby authorized to contract to convey it with covenants.—*Ramsey v. Wandell et al.*, 146.

11. Such a power can be executed without any covenants, either express or implied, and a power is to be strictly construed.—*Id.*

12. Where in a proceeding to distribute surplus moneys arising on a sale of real estate of a decedent it is stipulated that the claim of a creditor may be paid in full without abatement, such creditor should not be permitted to carry on a contest over the claims of other creditors.—*In re estate of Logan*, 143.

13. Where the claim of a creditor against the estate of a decedent is submitted to arbitration with the consent of the administratrix and heirs at law the award therein is final and bars the administratrix and heirs from further litigation over the claim.—*Id.*

14. Where a power of sale is given to an

- executor to be exercised in his discretion, his judgment if exercised in good faith is conclusive. If he fails to exercise his discretion so as to accomplish the purpose of the will the court may put him in motion or act in his place.—*Haight et al. v. Brisbin*, 154.
15. Where it appeared that the executor had made reasonable efforts to sell, but there was no demand for the property and its depreciation in value was due to the condition of the real estate market, *Held*, That a case for the removal of the executor was not made out.—*Id.*
16. Defendant's testator boarded with and was taken care of by plaintiff and her husband, and agreed to compensate them for such service. The husband, who is one of the executors, assigned his interest in the claim for services to plaintiff. The co-executor having refused to allow or refer the claim, this action was brought thereon. *Held*, That plaintiff being the real party in interest was entitled to recover, and could not be defeated because her husband would have been disqualified from suing by reason of his position as executor.—*Snyder v. Snyder et al.*, 163.
17. A judgment entered upon a complaint which alleges that defendants, as administrators, employed plaintiff's assignor as attorney-at-law to act for them as such administrators, and that he performed divers services upon and at the request of defendants as such administrators, and that defendants as such administrators, agreed and promised to pay him a certain sum, is one against the estate, and cannot be converted into a personal one against the administrators upon the ground that the allegations in regard to their representative character are merely *descriptio personarum*.—*Hertzfeld v. Parkes et al.*, 238.
18. An executor or administrator cannot bind the estate by an executory contract and thus treat a liability not founded upon a contract or obligation of his testator or intestate.—*Id.*
19. An executor may be required to account before the surrogate upon the application of a legatee, creditor or next of kin, having a demand against the personal estate of the deceased, where no final accounting has been had, although the executor, at the time of being required to account, is no longer holding the estate as executor but as trustee, and such executor may be required to attend before the referee appointed to examine and pass upon the issues raised by objections to the account and be examined as to his proceedings as such executor.—*In re accounting of Hutchinson*, 268.
20. An executor holds from the will itself, and the law, by a subsequent probate of it and qualification of the executor, has secured two principal objects, viz., proof in the only form the law can recognize, and that there will be no renunciation of the obligation of administration; and notwithstanding 2 R. S., 71, § 16. providing that no executor, before letters, "shall have any power to dispose of any part of the estate, except, etc.," a sale by a person named in a will as executor, of assets of the estate, before probate, for full value and for the benefit of the estate, is validated by the subsequent qualification of the same person as executor.—*Thomas v. The N. Y. Life Ins. Co.*, 335.
21. Where a sale so made is not one which would be a rightful act of administration, and is not made valid by relation, in an action for conversion of the goods brought by the executor after probate and letters the true rule of damages requires that the amount of money formerly paid into and remaining with the estate should be applied to reduce the amount of the recovery, viz., the true value of the goods.—*Id.*
22. An action at law will not lie to recover a distributive share of an intestate's estate, though a promise to pay has been made, unless it can be shown that the administrator holds the property individually on a new contract of loan to him. In all other cases the relief is in equity.—*Fischer v. Fischer*, 343.
23. Where the complaint in such an action alleged defendant's appointment in another State as administrator, and the collection by him therein of certain moneys of the estate, and that defendant is a resident here and has such moneys, in the absence of a more specific allegation the moneys will be deemed to be in the foreign jurisdiction, and an order for defendant's examination will be vacated on the ground of lack of jurisdiction over the subject matter.—*Id.*
24. Probate of a will being contested and the proceedings continued, the special guardian for the sole heir at law made application, on his petition and the foregoing proceedings, for the appointment of a temporary administrator. The petition stated that the petitioner "as such special guardian" prayed for such appointment. *Held*, That the application was that of the infant, and therefore of a person interested in the estate; that the proceedings and petition presented all the jurisdictional facts.—*In re will of Chase*, 409.
25. There is no arbitrary principle or provision of law preventing the appointment to the office of temporary administrator of the person named as executor in a will over which there is a contest.—*In re Bankard*, 452.
26. The Surrogate has no power in the order appointing a temporary administrator to make an allowance to such administrator to compensate him for the expense in

curred in the course of the application for his appointment.—*Id.*

See COSTS, 6, 8, 9; EVIDENCE, 18, 19; JURISDICTION, 8; MORTGAGE, 9, 10; NEGLIGENCE, 32; TRUSTEES, 8; USURY, 2.

#### EXTRA ALLOWANCE.

See COSTS, 1, 4.

#### EXTRADITION.

1. In case the provisions of section 5278 of the Revised Statutes of the United States have been complied with, the Executive of the State upon whom requisition is made for the arrest of the fugitive has no discretion to inquire into the facts certified by the Executive demanding the accused, but the duty is imperative to issue his warrant for the arrest of the fugitive, and to deliver him to the Executive authority, or the agent of the executive authority, making the demand.—*The People ex rel. Nubell v. Byrnes et al*, 357.
2. When a warrant is issued under the provisions of the above section of the Revised Statutes of the United States for the arrest of a person, the warrant containing only the initials of the Christian name and the surname, and by demurrer and traverse the issue is made that the person arrested is not the person named, it is the duty of the court to take proof upon the question of identity, and if such proof establishes the identity of the person named to be the person intended, then the writ of habeas corpus should be dismissed and the relator returned to custody.—*Id.*
3. The presumptions of law are in favor of the regularity of a warrant.—*Id.*

#### FALSE IMPRISONMENT.

1. Where a physician was arrested, taken before a magistrate and confined in jail about an hour, *Held*, In an action against said magistrate for false imprisonment, that a verdict of \$950 was excessive.—*Bocock v. Cochran*, 214.
2. In issuing a warrant upon a sworn complaint and in deciding upon the sufficiency of said facts, the magistrate acts judicially, and is not liable to a civil action because the facts were insufficient.—*Id.*

#### FALSE PRETENCES.

1. To constitute the crime of false pretences there must be proof that the pretences were made with intent to cheat and defraud another, and that the property was parted with upon and under the inducement of the false pretences alleged. Mere silence, suppression of the truth, or withholding of knowledge on which another may act is not sufficient.—*The People v. Baker*, 816.

#### FALSE REPRESENTATIONS.

1. The owner of property stored in a storage warehouse, which has been destroyed by a conflagration, cannot maintain an action, as for false representations, based upon a statement of the owner of the warehouse theretofore made by him to plaintiff that the building was fire-proof.—*Hickey v. Monell*, 475.

2. Such a statement is not a statement of fact, but an expression of opinion.—*Id.*

See ARREST, 3; DECEIT; FIRE INSURANCE, 8; FRAUD, 7.

#### FERRIES.

See CONSTITUTIONAL LAW, 3.

#### FIRE INSURANCE.

1. A parol agreement to renew a policy, made by an agent who has power to issue, renew, &c., is valid and binds the company.—*O'Reilly v. The Corporation of the London Assurance*, 147.
2. A retention of the proofs of loss by the company without objection except that it is not liable, is a waiver of objection as to defects in the proofs or as to the time of their presentation.—*Id.*
3. Where there is an open account between the agent and the assured, in which it has been customary for the premiums to be charged a failure on the part of the assured to pay the premium at the time of the agreement to renew is no defense to an action on such agreement.—*Id.*
4. A failure of the agent to charge such premium or to account for it to the company cannot affect the rights of the assured.—*Id.*
5. One of the plaintiffs swore to a proof of loss which stated that they were owners of real estate, in which, in fact, they had no interest. The plaintiff believed, however, that he had an equitable interest. By the same policy personal property was also insured. It was conceded that the policy was void as to the real estate. Upon the trial of this action to recover for the personal property the court charged generally that fraud would prevent a recovery, and allowed proof of the misstatement as to the real property. Defendant then requested a charge that if the plaintiff made, swore to and delivered the proof of loss intending to obtain the amount of insurance on the real property, knowing that plaintiffs were not the owners, such false proof prevented a recovery for the personal property. The court refused. *Held*, That as the contract was separable the refusal was not erroneous.—*Schuster et al v. The Dutchess Co. Mut. Ins. Co.*, 187.

6. When a policy of fire insurance declares that any misrepresentation whatever, either in a written application or otherwise, shall avoid the policy, the fact of such misrepresentation is entitled to have the same effect, when relied upon as a defense, as it would have if the defense of a breach of warranty was set forth in the answer.—*Jackson v. The St. Paul F. & M. Ins. Co.*, 485.
7. A description in an application for insurance of the property to be insured as "a story and-a-half hard finished boarding-house building" is a representation that both the first story and the half story above it were hard finished; and if, in fact, only the first story was hard finished, while the half story above was what is known as "cloth finished," such description is a misrepresentation of a material fact which avoids the insurance.—*Id.*
8. In an action by one insurance company against another on a policy of re-insurance issued by the latter, the re-insuring company is not estopped from setting up as a defense a false representation made by the agent of the first insurance company and the application for reinsurance by the fact that, in an action by the assured against the first company, which resulted in favor of the plaintiff, and in the defense of which counsel for the reinsuring company took part, the same false representation was set up as a defense as having been made by the assured.—*Id.*

## FIREMEN.

1. Relater fell from the tender, hurt his leg and went home. He failed to report, although directed by the medical officer to do so, but finally did so pursuant to written order, but refused to explain his default and remained silent. He was removed for being absent without leave, disobedience of orders and neglect of duty. *Held*, No error; that it was his duty to be at his post ready to obey proper orders even though excused for a time from service at fires; that if his injury was a sufficient excuse he should not have remained silent when given an opportunity to explain.—*The People ex rel. Masterson v. Fire Com'rs.*, 277.
2. Plaintiff was appointed assistant engineer in the Fire Department of N. Y., but was at times, by order of the Commissioners, assigned to duty as a machinist, during which he received a smaller salary, for which he receipted in full without objection. *Held*, That such transfer did not constitute a removal within § 77, Chap. 335, Laws of 1878, and that plaintiff's action amounted to a waiver of any right to claim compensation as assistant engineer.—*Riley v. The Mayor, &c., of N. Y.*, 391.
3. It is competent for the Commissioners, with the acquiescence of the person employed, to assign him to the performance of other duties in the general course of his employment, although they differ in some respects from those usually discharged by him, and it is competent for them to change the rate of compensation to be paid to any assistant engineer.—*Id.*
4. The rule that when a fixed salary or compensation for services is provided by law, or the right to fix such compensation is given to one class of persons, it is not competent for another officer, whose duty it is to engage persons to perform the services, to stipulate for a smaller rate than that established, does not apply when the persons authorized to effect the employment are also empowered to fix the compensation.—*Id.*

## FORECLOSURE.

See EVIDENCE, 6; MORTGAGE, 7, 9, 10, 15-22; REFERENCE, 7; SALE, 1; STAY, 3.

## FORGERY.

1. On an indictment for the forgery of bank notes the incorporation of the bank may be proved by testimony of the most general character and it is not necessary to produce the act of incorporation or the law under which it was incorporated.—*The People v. D'Argencour*, 135.
2. Testimony of the engraver of the American Bank Note Co. that said company engraved the plates from which the genuine notes were printed and that such plates were in the vaults of the company is sufficient to show that defendant had no authority to make the plate alleged to be forged.—*Id.*
3. A failure to charge an intent to defraud in an indictment for forgery in the second degree, committed before the Penal Code went into effect, is not a fatal defect.—*Id.*
4. Defendant was convicted of forgery in the first degree in having disposed of a forged coupon. There was proof that the coupon had been altered, the number having been changed. *Held*, That the evidence was sufficient to show an intent to defraud.—*The People v. Raymond*, 137.
5. To bring a case within the provisions of § 668, Code Crim. Pro., it is not necessary that the second offence shall be of the same character or grade as the first.—*Id.*
6. Defendant had previously been convicted of forgery in the third degree. *Held*, That as defendant had previously been convicted of a felony, the life penalty on a second conviction was not discretionary, but imperative.—*Id.*
7. An instrument which is invalid on its face cannot be the subject of a forgery.—*Pradner v. The People*, 433.

## FRAUD.

1. Certain evidence held sufficient to support a decision that certain instruments are fraudulent and void.—*Baker v. McLoughlin et al.*, 29.
2. The circumstances that property is conveyed for a consideration named in the deed of less than half the value of the property and that the grantor is to be allowed to reside on the premises and be supported there are sufficient to uphold a finding that such conveyance was made with intent to defraud creditors.—*Coddington v. Vandevanter et al.*, 126.
3. In an action to set aside such conveyance as fraudulent, declarations of the grantor, made subsequent to the conveyance but while he was in apparent possession of the premises, are competent against him.—*Id.*
4. A devisee under a will can maintain an action to set aside conveyances made by the testator during his lifetime, subsequent to the date of his will, as having been obtained from said testator by undue influence and in fraud of the rights of such devisee under the will, without previously procuring the admission of the will to probate.—*Morris et al. v. Morris*, 138.
5. Certain evidence held sufficient to sustain judgment setting aside a judgment for fraud.—*Robles et al. v. Gallentine*, 153.
6. An intent to defraud cannot be imputed to one who contracts a debt knowing that he is insolvent merely from the fact of his insolvency and his omission on a purchase upon credit to disclose such condition to his vendor, but the necessary facts must be made out by competent evidence.—*Morris et al. v. Talcott*, 159.
7. Representations made by a party with a view of procuring credit, to affect subsequent credits extended by the vendor, must be made in the course of the dealing and under circumstances from which it may be inferred that they were made with an intent to induce a continued credit.—*Id.*
8. Defendant, to secure a loan to a corporation, took \$6,000 bonds of the company as collateral, which upon non-payment of the loan he sold to one J. for \$640. J. brought suit against R. as trustee, and recovered the amount of the bonds. Defendant afterwards brought suit on his debt against plaintiffs as trustees and recovered judgment for the amount of his loan less the amount received from J. Afterwards R. settled the J. judgment by paying \$1,800. In an action to restrain the second judgment, *Held*, That defendant could not be charged with fraud in the transaction as he was entitled to receive the amount due him for the loan and his costs, but that as the payment to J. was made in good faith without knowledge of defendant's rights, defendant was bound by it and must allow such payment on the amount due him on the loan.—*Roach et al. v. Duckworth*, 185.
9. Certain evidence held sufficient to support the finding by a jury that a certain purchase of goods was fraudulent.—*Sibley et al. v. Killem et al.*, 190.
10. A schedule verified and filed by an assignor, and being a part of the assignment, and necessary to its validity, is competent evidence against the assignee.—*Id.*
11. In 1869 the parties entered into a verbal agreement by which plaintiff left with defendant certain sheep, which plaintiff was to have at any time he called for them, he to have the natural increase; this increase was agreed to be their doubling in three years. In 1878 plaintiff demanded the sheep and their increase at the above rate. *Held*, That the contract was not void by the statute of frauds because verbal and was one which could be performed in a year.—*Jobe v. Davidson*, 193.
12. Only a judgment creditor after execution returned unsatisfied can bring an action to have a conveyance set aside because made without a valuable consideration.—*Briggs et al. v. Van Buren et al.*, 216.
13. Mrs. B. deeded premises without consideration to the defendant J. B., her daughter. Afterwards Mrs. B. mortgaged the same premises to her other children as alleged to secure them for moneys belonging to them received by her as guardian and expended for her own use. The mortgages were foreclosed and the mortgagees bought. No accounting between Mrs. B. as guardian and the other children has ever been had, and whether she is indebted to them does not appear definitely. In an accounting by the children to set aside the deed from Mrs. B. to J. B. as fraudulent and void as to them, *Held*, That the suit could not be maintained.—*Id.*
14. The complaint was on a promissory note and for the price of a machine. The answer alleged that the note was given for a patent right; that the sale of the patent right and the machine was induced by fraud and that both were worthless. Defendant offered to show these facts as a defense and as a counterclaim. The court directed a verdict for plaintiff on the ground that defendant should have alleged an offer to restore the property. *Held*, Error. In an action for damages for the fraud no return of property is necessary, and its retention is not a bar.—*Horton v. Dorr et al.*, 224.
15. An action at law will always lie to recover damages for a fraud without an offer to return the property received under the contract which was induced by the fraud. It is only when an action in equity is



brought to set aside the contract for fraud that there must be a restoration of whatever was received under it.—*Strong v. Strong*, 491.

16. In an action for fraud on the sale of land it appeared that defendant C. contracted to sell the land, which belonged to his wife, and made the false representations; that the wife, S. B., conveyed to plaintiff and retained the bulk of the purchase money. The answer admitted the purchase from S. B. *Held*, That B. assumed to act as the agent of his wife; that she so ratified his agency as to make the contract one with herself, and that the receipt and retention by her of the bulk of the proceeds rendered her liable for the fraud, although she was innocent of it and did not personally participate in it.—*Krumm v. Beach et al.*, 541.
17. In such an action evidence of the value of other land represented to be owned by the vendor and included in the conveyance, but which was not so owned or conveyed, is admissible as bearing on the question of damages, and also to show intent to defraud.—*Id.*

See BANKS, 1, 2; CONTRACT, 24, 25; DEPOSITIONS, 2, 3, 8; PARTNERSHIP, 18, 14.

#### GIFT.

1. A gift *inter vivos*, perfected by delivery of a deed of gift, is complete, although made without consideration. And a written assignment of securities without delivery thereof is a sufficient declaration that the assignor holds the same in trust for the assignee.—*Smither v. Bissell et al.*, 264.
2. Plaintiff's mother sold certain premises to defendant and took back a mortgage payable to plaintiff after the mother's death. This mortgage remained in the mother's possession until it was surrendered to defendant. *Held*, That a gift to plaintiff of the debt or mortgage was not consummated, and that she had no title thereto.—*Stokes v. Pease*, 310.

See LIEN, 2.

#### GUARANTY.

See UNDERTAKING, 1-4.

#### GUARDIANS.

1. Under Chap. 859, Laws of 1870, the Surrogate had power, after the death of a general guardian, to vacate a previous decree settling his accounts; and the administrator of such general guardian is a necessary and proper party to proceedings to vacate such decree.—*Andrade et al. v. Cohen et al.*, 209.
2. The Surrogate has no power under 3 R.S., 6th Ed., 171, §§ 32-37, after vacating a previous decree settling the accounts of a

general guardian, to decree that the estate of the said guardian, he having died in the meantime, was indebted to his wards in a certain amount, and to order his administrator to pay such amount, and in default thereof that his sureties should be prosecuted on their bond.—*Id.*

3. A surety on a bond for faithful performance of duty by a special guardian and that he shall pay over, &c., according to the order of the court, cannot, to escape liability, assail the proceedings under which his principal received the moneys which he refuses to pay over. The order of the court directing their payment is conclusive on the guardian and measures the liability of the surety.—*Dodge v. St. John*, 273.
4. The omission of a penalty in such a bond does not affect its validity, but makes the liability commensurate with the condition.—*Id.*
5. The expenditures of a guardian for the support and maintenance of his ward will generally be limited to the income of the fund in his hands; but where the fund is small and a larger sum than the income is necessary for such support the capital may be broken in upon, but only to the extent necessary to answer the just and proper demands of the ward.—*In re accounting of Wandell*, 294.
6. The burden of showing such encroachment on the principal to be necessary and proper rests on the guardian on his accounting.—*Id.*
7. The court will not appoint as special guardian the father of an infant desirous of bringing an action, where it appears that the father is not of sufficient means to fulfil the requirements of Code Civ. Pro., § 469, and Rule 49, though it appears that such infant has no other friend or relative of greater means to take such position.—*In re Mang*, 352.
8. A guardian who occupies his ward's real estate becomes indebted for the reasonable value of such occupation, but the nonpayment of such sum does not constitute embezzlement within Ch. 208, Laws of 1877.—*Bingham v. Beckwith*, 422.

See EXECUTORS, 7-9.

#### HABEAS CORPUS.

1. Where no traverse is made of the facts set forth in a return to a writ of habeas corpus those facts must be taken to be true and the court cannot consider any allegations in the petition upon which the writ was granted.—*The People ex rel. Evans v. McEwen*, 196.
2. Where a prisoner has been legally sentenced and is in the proper custody he cannot be released because the mandate in the

hands of the superintendent of the penitentiary is not a true copy of the record.—*Id.*

See APPEAL, 17; CONTEMPT, 4; CRIMINAL LAW, 1; EXTRADITION, 2.

### HIGHWAYS.

1. Where village trustees, acting as commissioners of highways, determined that a private road should be laid out, *Held*, It is to be presumed that all preliminary requirements of the statute had been complied with.—*The People ex rel. Cashman v. Heddon et al.*, 178.
2. Referees appointed to hear an appeal from the determination of such trustees can inquire only into the fitness or unfitness of laying out the road.—*Id.*
3. The opinion of the tribunal below is no part of the record, and an error appearing only in such opinion is not ground of reversal.—*Id.*

See BRIDGES; NEGLIGENCE, 18, 19.

### HUSBAND AND WIFE.

1. Where a husband and wife are once more living under the same roof the court will hold as matter of law that there is a reconciliation, and it will not consider the question whether they actually cohabit or occupy the same room.—*Zimmer v. Settle et al.*, 245.
2. The statutes of this State have not changed the common law liability of the husband for his wife's torts, except as regards those committed by her in the management and control of her separate property.—*Muser et al. v. Lewis*, 450.
3. Where the wife carries on a legitimate business and receives in it stolen goods, the husband is liable with the wife, for she cannot carry on a business of receiving stolen goods nor acquire any property in such goods.—*Id.*

See BONDS, 1, 2; CONTRACT, 5; CREDITORS' ACTION, 4, 5; DISORDERLY PERSONS; FRAUD, 16.

### INDICTMENT.

See FORGERY, 8.

### INFANTS.

See EXECUTORS, 7-9; WILLS, 27-30.

### INJUNCTION.

1. A Court of Equity should interfere, when sufficient equitable reasons are presented for doing so, to restrain the prosecution of an unconscionable action, although it may be pending in the courts of another state or country. This may be done by controlling

the conduct of the parties when they are subject to the jurisdiction of the court so interposing for the prevention of injustice.—*Dinmore v. Neresheimer et al.*, 45.

2. An injunction will not be granted in an action to set aside a judgment on the ground that it was fraudulently entered upon a false affidavit of personal service of the summons to restrain the enforcement of such judgment by execution when the time has elapsed within which the judgment creditor could issue execution without leave of the court.—*Fullan v. Hooper*, 93.
3. The proper method of attacking such a judgment is by motion to set it aside as a fraud upon the defendant therein and upon the court.—*Id.*
4. Defendants made several unsuccessful motions before finally succeeding in dissolving an injunction. *Held*, That defendants are entitled to their personal expenses in connection with the last motion only.—*Lyon et al. v. Hersey et al.*, 100.
5. The expenses of a special train hired by counsel to move to vacate an injunction may be allowed in a proper case as damages sustained by reason of said injunction. Also counsel fees incurred in such service, but not in fact paid, may be allowed.—*Crouse v. The Syr., C. & N. J. R.R. Co. et al.*, 174.
6. Plaintiff was organized under the general act, Ch. 737 of 1873, to furnish water, &c., and did furnish water to defendant for several years. That act gave plaintiff power to lay pipes in defendant's streets. A disagreement arose as to the price at which water should be had, and plaintiff obtained an injunction restraining defendant from using water from the hydrants for any purpose. *Held*, Error; that plaintiff owed the public a duty to perform the purposes for which it was organized; that equity would not interfere to deprive defendant of all protection against fire in order that plaintiff might be compensated.—*The West Troy Waterworks Co. v. The Village of Green Island*, 207.
7. Where the complaint in an action in which an injunction was issued was dismissed "without deciding whether plaintiff was entitled to such injunction," and no further action was taken to determine that question, *Held*, That defendant was not entitled to a reference to ascertain his damages sustained by reason thereof.—*Kelly v. McMahon*, 223.
8. An injunction may issue to restrain a nuisance, as the remedy in equity is more adequate and better adapted to reach the justice of the case than a mere action at law for the recovery of damages.—*Hallock et al. v. Scheyer et al.*, 372.
9. Defendants, whose store adjoined that of the plaintiff Baranski, in Grand street, New

York City, erected a show case, sign and fence, eight feet and a half high and four feet wide, out on the walk in front of his store, which obstruction projected three feet upon the sidewalk beyond the front line of the adjoining building, so as to exclude from view Baranski's show window and store from persons approaching from one direction, thereby tending to exclude his customers from it, and to injure his business. *Held*, A proper case for an injunction restraining the continuance and maintenance of the nuisance and illegal obstruction erected by defendant, and that Baranski, who was a lessee of the building, did not impair his right to relief by joining with him the executors of his lessor, as they may properly be regarded as parties in interest, as the obstruction tends to lessen the rental value of their premises.—*Id.*

See CORPORATIONS, 5, 6, 20; PRACTICE, 8.

#### INSOLVENT INSURANCE COMPANIES.

See ATTORNEYS, 1; RECEIVERS, 3, 8; SET-OFF, 3.

#### INSPECTION.

1. Where in an application for an order to examine defendants' books to ascertain the names of persons to whom defendants had sold certain merchandise in contravention of their agreement to sell only to plaintiff, in order to enable plaintiff to frame complaint, the petition alleges that defendants did so sell to other persons, *Held*, That the application should not be granted; that the knowledge or information which enabled plaintiff to make this distinct and definite statement was enough to enable plaintiff to frame her complaint.—*Meliesy v. Kahn et al.*, 339.
2. Where the petition for an inspection of writings before issue joined contains enough matter to enable plaintiff to frame his complaint, the application should not be granted, though it may appear that certain of the allegations must be made on information and belief.—*Rafferty v. Williams et al.*, 341.

#### INTEREST.

See JUDGMENT, 2; TRUSTEES, 1.

#### INTERVENTION.

See DIVORCE, 6.

#### JOINT DEBTORS.

1. The death of one of the makers of a joint and several note against whom a separate judgment was rendered prior to the Code of Civil Procedure will not discharge his liability. Entry of the judgment severed the joint liability and barred an action against the other maker.—*Smith et al. v. Kibbie*, 118.

2. An action against joint and several obligors for contribution is one of equitable cognizance, and it is not necessary for plaintiff to show that he paid at the express request of defendants.—*Hoyt et al. v. Tuthill et al.*, 437.

8. The obligation being several, the release of one obligor does not discharge the rest.—*Id.*

#### JUDGMENT.

1. Defendant having answered, a successful plaintiff may take any judgment consistent with the case made by the complaint and embraced within the issue.—*Baker v. McLoughlin et al.*, 29.
2. A judgment is not a contract or obligation within the meaning of the exception in Chap. 538, Laws of 1879, and draws interest only at the statutory rate although entered before the statute went into effect.—*O'Brien v. Young et al.*, 86.
3. Where a justice, in plaintiff's absence, received the verdict of a jury, which was in defendant's favor, and thereupon entered judgment of discontinuance, with costs, *Held*, That the judgment was substantially such as the statute required, and the verdict was a nullity and no bar to a second suit for the same cause.—*Ripley et al. v. McCann*, 123.
4. When a judgment in an action establishes a right of a person not a party to such action, such person, although he is not bound by said judgment, may elect to take advantage of it, and if he does so the parties to the action are bound by it.—*Shipman v. Rollins et al.*, 370.

See APPEAL, 12, 24; ARREST, 1; ATTACHMENT, 2; EXECUTION, 7; EXECUTORS, 17; FRAUD, 5; INJUNCTION, 3, 8; MORTGAGE, 7, 22; PARTITION, 3, 4; PLEADING, 8, 9; PRACTICE, 9, 11, 18; RAILROADS, 7; RECEIVERS, 1, 2; SET OFF, 3.

#### JURISDICTION.

1. A cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done, and the place where the cause of action arises is the place where such acts are done or are omitted.—*The Toronto General Trust Co. v. The C. & Q. R.R. Co.*, 42.
2. Where the gist of the cause of action between two foreign corporations consists in the wrongful transfer of stock by defendant's transfer agent, which wrongful transfer was made in New York city upon a surrender here of the stock certificates and new certificates issued here to the purchaser, the cause of action arises here, and it is consequently error for the court to set aside a summons served on one of defendant's officers in the City of New York, upon the

ground that the court had no jurisdiction of the action.—*Id.*

3. Where there is neither allegation nor proof in an action against a foreign executor that defendant has brought into the state assets of the estate the court is without jurisdiction, and this concerns the power of the court and not the person of the defendant, and therefore is not waived by appearance and answer on the merits.—*Gray v. Ryle*, 350.
4. Defendant's answer set up as defense that both parties are non-residents and the case is not within § 1780, Code Civ. Proc. Four months later defendant gave notice of motion to dismiss on the same ground. *Held*, That a denial of the motion without prejudice to defendant's right to raise the question on the trial was right.—*Edwards v. The Berkshire Life Ins. Co.*, 423.
5. Where the object of two legal proceedings is the same the proceedings should be continued in the case where process was first issued, and the fact that the second action was commenced without notice of the pendency of the first does not alter the rule. The court obtains jurisdiction in an action to partition lands, although there is no land situate in the county which the summons and complaint named as the place of trial.—*Kimball et al. v. Mapes et al.*, 431.

See APPEAL, 22, 23; EXECUTORS, 23; LUNATICS, 8; PRACTICE, 15, 16.

#### JURORS.

1. Where a juror is otherwise incompetent from actual bias he must be required to declare on oath that he believes that his opinion will not influence his verdict and that he can render an impartial verdict according to the evidence; it is not sufficient that he *supposes* he can do so, or that he declares that his opinion *ought not* to influence his verdict.—*The People v. Casey*, 181.
2. Where the court held that jurors who failed to so testify were competent and defendant was thereby compelled to exhaust his peremptory challenges before the jury was fully empannelled, *Held*, That the erroneous ruling was not harmless.—*Id.*
3. The right of a defendant to challenge the body of the grand jury because irregularly or defectively constituted no longer exists; he can raise no objection except to individual jurors under § 239, Code Crim. Pro. *The People v. Hooghkirk*, 322.
4. Where the examination of a juror clearly warrants the conclusion that in an action like the one to be tried he would require stronger evidence to find for the plaintiff than in other cases, a challenge for favor should be sustained.—*Mullen v. Christian et al.*, 426.

See PRACTICE, 1, 2.

Vol. 19.—No. 26a.

#### JUSTICES OF THE PEACE.

1. Justices of the Peace fall within the provisions of Sec. 13 of Article 6 of the Constitution of New York, prohibiting the holding "of office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age."—*The People ex rel. Lawrence v. Mann et al.*, 290.

See COSTS, 8; COUNTY COURT; EVIDENCE, 5; JUDGMENT, 8; PLEADING, 14.

#### LEASE.

1. Where a lease contains the lessor's covenant to "put and keep the roof in repair," and does not show an intention that he shall take notice of disrepair from his own observations, he cannot be held liable for damage caused by leakage occurring six months after the tenant went into possession, there being no evidence that the roof was out of repair before that time, unless, prior to the occurrence, the lessor knew or was notified of the condition of the roof.—*Thomas v. Kingsland et al.*, 71.
2. Where the reversioner and lessor assigns to a third person the written obligation of the lessee to pay rent, the thing transferred is a mere chose in action, and the assignee has no occasion to inquire as to the contents of a real estate mortgage which professes to pledge rents and profits.—*Riley v. Saxton et al.*, 308.
3. The rule is that where the landlord violates his covenant to repair the tenant may make the repairs and charge the landlord with the cost, or he may recover for the loss of the use of that part of the premises which the failure to repair has prevented him from enjoying. In order to recover consequential damages it must appear that they were foreseen at the time of the contract, and damages are remote when they do not immediately and necessarily flow from the breach complained of.—*Chadwick v. Woodward*, 456.
4. The above doctrines applied to a case of damage to health and business from defective plumbing and sewerage, and *Held*, That no recovery could be had by the tenant.—*Id.*
5. Plaintiffs, being the lessees of a portion of certain premises, were evicted by title paramount, and thereupon leased the whole premises anew at an increased rent and for a longer term, and subsequently sold said lease at a large profit. *Held*, Error to receive evidence of such fact in an action by plaintiffs to recover damages for breach of covenant for quiet enjoyment, the measure of damages in case of eviction being the difference between the rent received and the fair rental value of the premises.—*Fitzgibbons et al. v. Freisen*, 458.

6. Where the tenant deposited a sum of money "as security for the payment of rent according to the provisions and conditions of the lease, and security to be paid back to the tenant on the full compliance with the provisions of the lease on the part of the tenant," and the tenant was dispossessed during the term for the non-payment of rent, the amount being smaller than the deposit aforesaid, and no other covenant was broken, *Held*, That such deposit was not forfeited, but that the landlord could only withhold thereof the amount of the rent due.—*Scott v. Montello*, 462.

7. The measure of damages in an action for a breach of contract consisting in a failure on the part of defendant to put plaintiff in possession of premises which he had leased from defendant is the difference between the rental value of the premises and the rent reserved by the lease.—*Coleman v. King*, 551.

8. In such an action the jury was allowed\* to consider as elements of damage the value of plaintiff's time employed in seeking carpenters and painters to make alterations in the premises hired of defendant, his labor performed in searching for other premises after the breach on the part of defendant, and the rent which he was obliged to pay for such other premises. *Held*, Error.—*Id.*

See ASSIGNMENT FOR CREDITORS, 3; TAXATION, 10, 11.

#### LEGACY.

See WILLS, 8, 9, 41.

#### LIBEL.

1. A publication in a newspaper in relation to one who was in fact a physician, charging that he, as a coroner, had held an inquest on a man, supposing him to be dead, when he was in fact alive, and that the man would have been pronounced dead, and buried alive, but for the arrival of a physician on the scene, is not libellous *per se* where the article only refers to the coroner in his capacity as such officer and not as a physician.—*Purdy v. The Rochester Printing Co.*, 258.

2. A joint stock association organized under the laws of this State, and having a president or treasurer, is liable to an action for libel although it does not appear that it consists of seven or more shareholders or associates.—*Van Arnam v. McCune*, 412.

3. A pamphlet was published by a clergyman of the Protestant Episcopal Church, who had been removed from the office of missionary by the Missionary Bishop having jurisdiction over him, addressed to the bishops and clergy of said church, and accusing said Missionary Bishop of unfairness in delaying, &c., a proper ecclesiastical

trial of the charges for which he had been removed. In answer to this pamphlet the bishop published another, addressed to the same persons, and justifying his conduct in the matter, and, for the purpose of so doing, reciting charges of immoral conduct against said clergyman which had come to his ears. In an action for libel, *Held*, That the bishop's pamphlet was privileged unless published with malice against the plaintiff and for the purpose of injuring him.—*Hinman v. Harts*, 441.

4. In such a case the court was requested to charge "that if the defendant had probable cause for believing, at the time he issued the pamphlet, the statements charged to be libellous, the plaintiff cannot recover." The court did not so charge. *Held*, No error.—*Id.*

#### LICENSE.

See MUNICIPAL CORPORATIONS, 4; STATUTES, 2.

#### LIEN.

1. Defendant, who kept a boarding stable, agreed with plaintiff's husband to take plaintiff's mare around to race courses, etc., and enter her for races, defendant to have half her winnings and plaintiff's husband to pay all expenses. *Held*, That the defendant did not board the mare within Chap. 498, Laws of 1872, and could not establish a lien for such expenses under that act.—*Armitage v. Mace*, 520.

2. Plaintiff's husband formerly owned the mare, but on her asking him to give it to her, said, "I will give her to you. She shall be your property." The mare was present at the time, and the husband notified the man in charge and told him he was to deliver the same to plaintiff when she wanted her. Plaintiff used the mare exclusively thereafter, and it was recognized in the family as her property. *Held*, Sufficient to authorize a finding that the mare was delivered to and possessed by plaintiff in pursuance and consummation of a gift.—*Id.*

See PARTITION, 3; REDEMPTION, 1.

#### LIFE INSURANCE.

1. A person holding a policy of life insurance does not forfeit such policy by omitting to pay the premiums when the company issuing the policy has ceased to do business, transferred its assets and become insolvent, for the further payment of premiums is excused by such insolvency; but the mere fact of an apparent or assumed insolvency, without a formal declaration thereof, does not excuse the payment of the premium.—*The People v. The Globe Mut. Life Ins. Co.*, 197.

2. Where, at the time when a premium on

a policy of life insurance had become absolutely due, a committee of the trustees of the company issuing it, appointed to investigate the condition of the company, had agreed to report that the said company was insolvent, but such report was not signed and proceedings to wind up the company were not taken until after the said premium became so due, and default was made in its payment without such insolvency of the said company being alleged as a reason for such default, *Held*, That the policy was forfeited.—*Id.*

3. *Semble*, That the policy would not have been forfeited if the insolvency of the company had been given as the reason of the non-payment of the premium.—*Id.*

4. Testimony considered and verdict of accidental self-killing set aside as against the weight of evidence.—*Knapp v. The Northwestern Mut. Life Ins. Co.*, 285.

5. Where an insurable interest exists at the time of taking out a policy on the life of a debtor, the creditor paying the premiums, the subsequent payment of the debt in whole or in part or the discharge of the debtor in bankruptcy will not invalidate the policy or furnish a defense to it.—*Ferguson v. The Massachusetts Mut. Life Ins. Co.*, 424.

6. Evidence of the party procuring the policy as to the health of the assured is admissible on the question of breach of warranty.—*Id.*

7. When it has been the custom of an insurance company, for so long and under such circumstances as to warrant a belief on the part of the assured that the custom will be continued, to notify the assured when the premium was payable and the amount of said premium, the policy being one entitling the assured to a share in the dividends of the company applied in reduction of the premiums, the failure of the company to give such notice will excuse the non-payment of a premium when first due, and the policy cannot be forfeited for that reason.—*The Atty.-Gen. v. The Continental Life Ins. Co.*, 448.

8. The policies in suit provided that they should be void if the assured "should die in, or in consequence of the violation of the laws of any nation, State or province." The assured, with his brother, made a violent assault upon one B., and after the latter had drawn a pistol endeavored to escape, when he was shot and killed by B., who testified that the shooting was not done intentionally. *Held*, That a sufficient relation between the act causing the death and the violation of law existed to avoid the policy; that a death within the meaning of the policy might occur without being intentionally inflicted, and that the case was not one in which a special verdict was required.—*Murray v. The N. Y. Life Ins. Co.*, 567.

See AGENCY, 8.

## LIMITATION.

1. When a complainant has concurrent remedies in law and in equity, time is as absolute a bar in equity as in law.—*In re accounting of Neilly*, 85.

2. The presumption of payment after the lapse of twenty years applies to a simple contract.—*Id.*

3. Section 414, Code Civ. Proc., relates to all the provisions of the chapter of which it is a part. Section 399 falls within the provisions of the chapter constituting the rules of limitation. Subd. 8 of § 414 has reference to the mode of commencing an action prescribed by the chapter of which it is a part, and compliance with § 99 of the old Code is not enough.—*Burgell v. Strickland*, 124.

4. The exception in § 975, Code Civ. Pro., puts restraint only upon the extension of time, and means that the disability shall not add more than ten years to the time limited after the disability has ended.—*Howell et al. v. Leavitt et al.*, 162.

5. A partial payment of a debt by a creditor to his debtor takes the claim out of the operation of the statute of limitations and revives the debt as effectually as an acknowledgment in writing signed by the party to be charged thereby.—*Gardner v. Gardner*, 249.

6. Where there is both a legal and an equitable remedy, the statute bar applicable to equitable remedies will be applied where the legal remedy is imperfect.—*Hoyt et al. v. Tutill et al.*, 437.

See BAR, 2; EVIDENCE, 17; TAXATION, 8, 9; TRUSTS, 1, 2.

## LOAN COMPANIES.

1. The Mutual Trust Co. was a corporation authorized to receive deposits, a guaranty company and a loan and mortgage company within the meaning of Chap. 324, Laws of 1874, and therefore one of the corporations required by the act to report to the Bank Department.—*The People v. The Mutual Trust Co.*, 116.

## LOTTERIES.

1. A loan made with a view of obtaining money to carry on the government of a nation, and which contains a provision by which the amount can be increased as to a portion of it upon a contingency named therein, does not constitute a lottery, and is not in violation of the constitution and laws of this State prohibiting lotteries.—*Kohn v. Kohler*, 368.

2. Lotteries subject to condemnation of the constitution and laws are schemes where

money is paid for the chance of receiving money in return.—*Id.*

### LUNATICS.

1. Unsoundness of mind is established when it is shown that the person was laboring under a delusion and was led to perform the act sought to be revoked by a belief that something existed which had no existence, except in his own imagination, and out of which he is incapable of being reasoned.—*Riggs v. The American Tract Soc.*, 37.
2. Plaintiff's intestate was a man of eccentric habits, and labored under an insane delusion that his family were inimical to him. Defendant's agent, with knowledge of these facts, advised him to dispose of his property during his life and not leave it as a source of litigation after his death, and offered in case he would then give defendant what he intended to leave it that it would pay interest on it during his life. This was done. In an action to revoke the agreement and recover the moneys paid, *Held*, That these facts were sufficient to justify a finding of unsoundness of mind and that defendant knew and took advantage of it; that it was bound by its agent's knowledge and that a charge that plaintiff could not recover unless intestate was of unsound mind at the time of the transaction and the agent had notice of his condition was sufficiently favorable to defendant.—*Id.*
3. The mortgage in suit was executed by the committee of a lunatic, in pursuance of an order of the court authorizing its execution for the purpose of paying a claim by an insane asylum for the support of the lunatic, to recover which an action had been commenced. The petition for such order showed all the facts necessary to confer jurisdiction. *Held*, That the court would not presume, for the purpose of subverting the order, that other debts existed which were not provided for; that the claim of the asylum constituted a valid debt against the lunatic, which could be enforced against his property independent of any action of his committee; that its existence constituted a sufficient ground for the application for leave to mortgage this real estate, and the filing of a petition showing its existence vested the court with jurisdiction.—*The Agricultural Ins. Co. v. Barnard*, 562.

### MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, where the facts are undisputed, the question of probable cause is for the court.—*Bingham v. Beckwith*, 422.

### MANDAMUS.

1. It is error for the court to grant a mandamus under seal upon a motion in an action. Mandamus is now a state writ, and

should be applied for in a separate proceeding.—*Youmans v. Terry*, 269.

See SURREGATES, 1; TAXATION, 8, 9; VILLAGES, 5.

### MARINE COURT.

See CONSTITUTIONAL LAW, 10.

### MARRIAGE.

1. The words "absented himself," as used in 2 R. S., 189, § 6, mean a withdrawal of the husband's whereabouts from his wife, his relations, and the ordinary and usual opportunities of identification—such a withdrawal from his wife and family as would, after the lapse of five successive years, lead naturally to the inference that death had ensued.—*Jones v. Zoller et al.*, 287.

### MARRIED WOMEN.

1. Defendant, a married woman, executed with her husband a bond secured by a mortgage upon her real estate in New Jersey, where she resided. In this action commenced in this State upon the bond, after the premises had been sold on foreclosure of a prior mortgage and there was no surplus upon such sale, *Held*, That the contract having been made in New Jersey, by residents of that State, and the mortgage being upon real estate situated there, the laws of that State must govern the contract; and there being no allegations in the pleadings of what the laws of New Jersey are the common law must be presumed to prevail there, and there was therefore no cause of action, the contract alleged being void under the common law.—*Seymour v. Alden*, 78.
2. In the absence of express agreement, services performed by a woman as a member of the family of her father-in-law are impliedly gratuitous, and if they are to be paid for the compensation belongs to her husband.—*Robles et al. v. Gallentine*, 153.
3. The firm of Percival, Wilson & Co. was indebted to the firm of McLaren & Co. Defendant, a married woman, executed a mortgage, at request of her husband, who was a member of the former firm, upon her separate estate, not knowing the purpose of the mortgage or to whom it was payable. In consideration of the same McLaren & Co. extended the time of payment to Percival, Wilson & Co. *Held*, That the mortgage could be enforced against her separate estate.—*McLaren v. Percival et al.*, 171.
4. The proceeds of an insurance policy upon the life of her husband, which have been actually received by the wife upon his death, and deposited in bank, are liable for debts which she has theretofore contracted in carrying on a separate business.—*Crosby v. Stephan*, 172.

5. A married woman who embarks in business as a member of a firm is liable upon the firm notes given for money to use and used in the firm business notwithstanding her coverture, and she is not relieved from such liability by the fact that her partner after receiving the money diverted it to his own use.—*Williams v. Burton et al.*, 899.

See ESTOPPEL, 2; MORTGAGE, 1.

#### MASTER AND SERVANT.

1. It is the general rule that an employee assumes the risks of the employment, but this rule has been changed by Chap. 123, Laws of 1878, as to the employment by any person of a child under the age of sixteen years in any business dangerous to the life and limb of such child.—*Hickey v. Taaffe*, 67.
2. The eight hour statute leaves the rate of wages open to be fixed by the agreement of parties intending to enter into the relations of employer and employee. Extra labor cannot be required nor extra compensation demanded unless an agreement therefor has been previously made by the parties.—*McCarthy v. The Mayor, &c., of N. Y.*, 184.
3. Where an employee enters upon the employment understanding that ten hours labor per day are required, and that the duration of his labors are dependent on extraneous circumstances an agreement to give him extra compensation cannot be implied.—*Id.*
4. Although the peculiar relations of the common seaman to his superior officers may relieve him from being charged with contributory negligence in obeying an order which exposes him to peril, yet the effect of these relations does not extend so far as to enable him to recover for the negligence of a co-employee.—*Olsen v. Clyde*, 430.
5. Though the master of a vessel may be the *alter ego* of the owners, the mate, while the master is on board, is not such *alter ego*, and though of superior grade with power to compel obedience, he is yet a fellow-servant with the common seaman, and for his negligence the seaman cannot recover against the ship-owner.—*Id.*
6. A lad of 19 years was employed in a paper factory; his work took him into all parts of the factory, which was five stories high, and had no way of access to the scuttle in the roof. The factory burned, and the boy, who was then in the fifth story, perished. *Held*, That the question of negligence was for the jury.—*Schwandner v. Birge et al.*, 431.
7. In an action brought by a minor under 16 years of age, for damages received from personal injuries while in the employ of the defendants in an occupation alleged to have been dangerous, the court refused to

charge "that if the plaintiff was negligent he could not recover." *Held*, No error.—*Hayes v. The Bush & Denslow Mfg. Co.*, 436.

8. When the servant within the scope of his duty enables another by his assent to injure a third person—e. g., by confiding to his care the management of machinery—the master is liable; but the burden of proving this assent is upon plaintiff, and the fact is necessary to his case.—*Edwards v. Jones*, 524.
9. An employer is not bound to protect the person employed against such risks of injuries as are incidental to the employment itself and are plainly to be perceived and comprehended by the employee when accepting the employment.—*Kennedy v. The Manhattan RR. Co.*, 549.
10. The plaintiff's intestate was employed by the defendant to stand upon the track of its elevated railroad and signal approaching trains and workmen engaged in excavating on the streets below when blasts could be discharged. After being engaged in such employment about a month he was killed by one of defendant's trains. *Held*, No negligence on the part of defendant in failing to provide a platform outside of its tracks as a means of escape for plaintiff's intestate in addition to the means ordinarily used by persons similarly employed of stepping upon the girders connecting the tracks or of letting themselves down under the track.—*Id.*

See NEGLIGENCE, 28-30.

#### MECHANICS' LIENS.

1. Upon a failure to file with the County Clerk notice of legal steps taken to enforce a mechanics' lien within one year from the date of filing such lien, as required by the lien statute, an entry made by the clerk to that effect will work a cancellation of such lien notwithstanding an action had been brought within the year to enforce the lien.—*Prior v. White et al.*, 70.
2. As the mechanics' lien law of 1875, applicable to New York City, was not repealed by the general law of 1880, a verification under the latter law that the statements therein contained are true to the best of his knowledge, information and belief is insufficient in a case arising in said city.—*Keogh et al. v. Main et al.*, 838.
3. Under the statute of 1875 a verification that "the same is true to the best of his own knowledge" is insufficient and confers no lien.—*Id.*
4. In an action to foreclose a mechanics' lien where there has been an abandonment of the contract by defendant, it is not necessary for plaintiff, in order to recover upon *quantum meruit*, to show legal excuse for not fully performing the contract, nor



where the time fixed by the contract for its performance has been waived to notify defendant of his intention and demand performance on his part within a reasonable time.—*Powers v. Hogan*, 459.

#### MEDICAL COLLEGES.

1. Chap. 319, Laws of 1848, and the acts amendatory thereof, do not authorize the formation of medical colleges.—*The People v. Gunn et al.*, 275.
2. Chap. 367, Laws of 1882, legalizing certain colleges, has reference only to scientific and literary colleges organized and authorized to be organized under the act of 1848, in whose organization there had been some imperfection, and did not apply to medical colleges.—*Id.*
3. Since the passage of Chap. 184, Laws of 1853, no medical college could be organized except as provided in said act of 1853 or by special charter.—*Id.*

#### MORTGAGE.

1. In the absence of a bond or an express covenant in the mortgage to pay, there is no personal liability for a deficiency, and the remedy of the mortgagee is confined to the mortgaged premises. No such covenant can be inferred or implied from a clause in a married woman's mortgage charging her separate estate.—*Mack v. Austin*, 6.
2. The mortgage in suit was assigned after being recorded by S., the mortgagee, to plaintiff's assignor, but the assignments were not recorded, and S. thereafter executed and delivered a satisfaction piece, which was recorded. Subsequently a mortgage on the same premises was given to R. et al., who had knowledge of the prior mortgage, and they assigned the same for value to defendants, who took without notice and recorded their assignment, which contained a guaranty of payment. *Held*, That plaintiff's mortgage was not entitled to priority as to defendants, but that plaintiff was entitled to redeem defendant's mortgage and to be subrogated to all their rights, including the guaranty.—*Clark v. Mackin et al.*, 8.
3. Where there is no bond and no covenant to pay the mortgage debt the mortgagor is not personally liable unless the instrument clearly shows such an intent on the part of the contracting parties.—*Smith v. Rice*, 16.
4. A recital in a purchase money mortgage, there being no bond, that the mortgagor "is justly bound in the sum of \$2,000," is not a sufficient admission of such an intent.—*Id.*
5. Plaintiff gave to S. a mortgage which contained no covenant to pay, but provided that the mortgagee should look to the land. No bond was given. Thereafter the land was sold to one L., who assumed payment of the mortgage and paid the balance of the purchase to S., under an agreement that the latter should pay the same to plaintiff with interest. In an action to recover said balance, defendant counterclaimed for a deficiency on foreclosure of the mortgage. There was some evidence that S. advanced money for plaintiff's benefit when the mortgage was given. *Held*, That the counterclaim was properly rejected.—*Spencer v. Spencer*, 32.
6. S. agreed with the owner of the equity of redemption to extend the time of payment. At the time of such extension the premises exceeded in value the amount of the mortgage. *Held*, That plaintiff was thereby released from liability, if any existed.—*Id.*
7. In an action of foreclosure the summons was served by publication on H., to whom the premises had been conveyed by the mortgagor. H. was, in fact, dead at the time of such service, but his death was unknown to the plaintiff, who purchased on the sale and was put in possession by a writ of assistance. In an action of ejectment by H.'s heirs, *Held*, That the judgment of foreclosure was a nullity as to them, and their dispossession unlawful.—*Hovell et al. v. Leavitt et al.*, 162.
8. Defendant executed to plaintiff a mortgage upon a flouring mill "with appendages of every description now used in and about the same, consisting of all dams, water-courses, &c." *Held*, That under the word "appendages" title passed to a platform scale, a corn-sheller, &c., which were in the mill when the mortgage was executed.—*Miller v. Hart*, 168.
9. In a foreclosure by advertisement and sale under the statute if a mortgagor leave a will naming executors they must be served with notice of sale, although they have never qualified.—*Van Schaack v. Sanders*, 170.
10. It seems, however, that such a foreclosure may proceed without such service where no personal representatives of a mortgagor have been appointed and where none are named in his will, if any.—*Id.*
11. A mortgage stated that there was conveyed thereby all the real property of the corporation in the county of Saratoga, and particularly all lands immediately adjoining the line of its road, and which were designed to be used in operating the said railroad. *Held*, That under these words passed all the real property which the company owned in the county at the time the mortgage was executed.—*Durant v. Kenyon et al.*, 195.
12. A bond and mortgage may pass by delivery, but such delivery must be by the

- owner or his duly authorized agent. Delivery by one in possession of the instruments only as agent to collect the interest passes no title.—*Mallock v. Robinson*, 229.
13. In case of such unauthorized assignment and delivery by an agent of the owner to an innocent purchaser, the principle that where one of two innocent persons must suffer the loss should fall upon that one who has made it possible does not apply.—*Id.*
  14. A bond and mortgage will pass by assignment although the instruments themselves are not delivered at the time.—*Id.*
  15. The only proper parties to a suit for a foreclosure of a mortgage, so far as mere legal rights are concerned, are the mortgagor, the mortgagee, and those who have acquired rights and interests under them subsequent to the mortgage, and the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim.—*Kent v. Popham*, 241.
  16. The owner of a judgment against the grantor of a mortgage, which is a lien upon the land covered by the mortgage, cannot be made a party to a foreclosure suit for the purpose of having the lien of his judgment declared to be subsequent to that of the mortgage.—*Id.*
  17. Defendant executed a purchase money mortgage, collateral to a bond conditioned to pay the principal sum to A. V. O., and the interest thereon, or on so much thereof as might remain at any time unpaid, to plaintiffs. The bond and mortgage were sold by the receiver of A. V. O. to one C., who executed a satisfaction thereof for less than the principal sum, and delivered it to defendant. *Held*, That the satisfaction was ineffectual to cut off the rights of plaintiffs in the mortgage, and that they were entitled to foreclose it to reach the share of the fund owned by them.—*Oyer et al. v. Oyer*, 313.
  18. In a mere action of foreclosure a title acquired prior to the execution of the mortgage can neither be contested nor defeated.—*The Emigrant Ind. Savs. Bk. v. Olute*, 332.
  19. A mortgagee whose mortgage is the last of a series of mortgages, the proceeds of each of which was applied to the paying off and taking up of the mortgage immediately preceding it, is entitled to have the original mortgage revived and enforced in his favor for the purpose of extinguishing the title acquired by a purchaser at an execution sale under an execution issued upon a judgment recovered against the owner of the property subsequent to the making of the first mortgage, but previous to the making of the last, when the said mortgages were given in ignorance of the existence of such judgment owing to the fact that the docket of it omitted an initial letter of the judgment debtor's name.—*Id.*
  20. The purchase of the property under the execution and the application of the purchase price upon the judgment, without paying it otherwise, does not vest such purchaser with the rights of a bona fide purchaser of a title so as to defeat an equity of the above description. The right so acquired would not in any event extend beyond the amount of money so paid.—*Id.*
  21. Where one has not been made a party to a foreclosure suit none of his rights are affected thereby.—*Krower et al. v. Reynolds*, 388.
  22. When an action is brought to foreclose a second mortgage on real property and subsequently another action is commenced to foreclose the first mortgage, and this second action proceed to judgment before the first, and the premises are sold under the judgment entered therein, leaving a surplus which the second mortgagee procures by the usual proceedings and applies upon his mortgage, and subsequently a judgment of foreclosure and sale is entered in the action to foreclose the second mortgage, the second mortgagee is entitled to have a judgment for the deficiency still remaining due upon his mortgage entered in his action without going through the form of a sale, &c., of the premises.—*Siewert v. Hamel*, 407.
  23. One J. G. applied to plaintiff for a loan to take up an overdue note. Plaintiff refused to take his note, but agreed to take a mortgage on the farm of H. G., and thereafter took up the note and delivered it to J. G. in exchange for said mortgage. *Held*, That as between J. G. and H. G. the former was principal debtor and H. G. a surety, and that plaintiff having knowledge of these facts was bound thereby.—*Grow v. Garlock et al.*, 578.
- See BANKS, 5; CREDITORS' ACTION, 2; DEEDS, 6, 7; GIFT, 2; LEASE, 2; LUNATICS, 8; MARRIED WOMEN, 1, 3; RECEIVERS, 4-6; REFERENCE, 7.
- ### MUNICIPAL CORPORATIONS.
1. A city is liable for the negligence of a contractor employed by it irrespective of the fact whether or not by the contract such contractor has stipulated to conduct the work with all needful care and to save the city harmless from all claims for injuries caused thereby.—*Dressel v. The City of Kingston*, 288.
  2. If part of a municipal corporation be separated from it by the erection of a new corporation, the former corporation retains title to all its personal property where no dif-

ferent provision is made by the act authorizing the separation.—*Board of Education, District School No. 2, v. Board of Education, District School No. 29*, 449.

3. The public powers and trusts devolved by law or charter upon the council or governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.—*Anderson v. The Equitable Gaslight Co. et al.*, 471.
4. Where a municipal corporation, or a department thereof, is authorized to make laws relative to a given subject, and to require of those desiring to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such license may be charged to the person desiring it, although such power is not expressly granted by the Legislature.—*The Mayor, &c., of N. Y. v. Miller*, 496.
5. The city cannot be held liable for failure to remove snow and ice from a sidewalk, without actual or constructive notice of its condition; this, notwithstanding the ordinance requiring owners to remove snow and ice within four hours, under penalty, etc., and though the city be the owner of the premises in question.—*Heintze v. The Mayor, &c., of N. Y.*, 507.
6. When the city grants to a person a license which it has no power to grant, and an injury to a third person results from the negligent mode in which the licensee exercises the privilege granted to him, which mode is not part of the license or grant, the city is not liable for the damages accruing from such injury without some proof of negligence showing permission to use, or acquiescence in the use of such negligent mode of exercising the license, after notice or knowledge on the part of the city.—*Cohen et al. v. The Mayor, &c., of N. Y.*, 514.
7. In case of personal injuries caused by slipping on ice formed on the street, a municipal corporation is liable only for the exercise of reasonable diligence after the unsafe condition of the sidewalk is shown to its agents, either by actual notice or by constructive notice, as when the unsafe condition has continued long enough to become notorious.—*Muller v. The City of Newburgh*, 550.

See COSTS, 7; INJUNCTION, 6; NEGLIGENCE, 38; PLEADINGS, 3.

### MURDER.

Facts insufficient to show such a "deliberate and premeditated design" to kill as to constitute murder in the first degree.—*The People v. Conroy*, 488.

See EVIDENCE, 15.

### MUTUAL BENEFIT ASSOCIATIONS.

1. The "Beneficiary Fund" of an association organized under Ch. 496, Laws of 1879, does not become a part of the property or estate of the person insured after his death, and does not go to his administrator under the charter and by-laws of the association.—*Bown v. The Supreme Council of the Catholic Mut. Ben. Assn.*, 432.

See PLEADING, 16.

### NATIONAL BANKS.

See BANKS, 1, 2, 5.

### NEGLIGENCE.

1. In an action to recover damages for injuries caused by being struck by a railroad train passing a depot-platform upon which plaintiff claimed to have been standing at the time, the court charged the jury as follows: "Now, gentlemen, what the defendant was bound to do, or what it was not bound to do, what precautions it was bound to take, or not to take, I leave to you, under the circumstances of this case, to say in determining the question of negligence. *Held, Error.*—*Archer v. The N. Y., N. H. & H. RR. Co.*, 10.
2. In an action to recover damages for the death of plaintiff's intestate, which was caused by his being thrown from a wagon in a collision with one of defendant's cars, and which collision it was alleged was caused by the negligence of defendant, witnesses were allowed to testify that immediately after the collision the driver of defendant's car had said that "he could not help it, his brake was broken and out of order, and he could not stop the car." *Held, Error.*—*Pfeffels v. The Second Ave. RR. Co.*, 44.
3. A person passing along a sidewalk has a right to presume it to be safe, and is bound to no special care and cannot be charged with negligence for not being on his guard against an unlawful obstruction, nor for not looking for it although it is visible.—*Dorland v. The N. Y. C. & H. R. RR. Co.*, 76.
4. In an action to recover damages for the death of plaintiff's intestate, caused by the negligence of defendant, where the only proof on the part of the plaintiff is that defendant made a large hole in a public sidewalk and left the same improperly guarded at night, and that the next morning the dead body of plaintiff's intestate, who had been seen late the night before in a sober condition, was found in such hole, the complaint should not be dismissed for failure of proof of want of contributory negligence. The question of contributory negligence in such a case should be left to the jury to determine.—*Id.*

5. One who drives horses along the streets of a city is bound to anticipate that foot passengers may be on the crossings and to take reasonable care not to injure them, and he is negligent when he fails to look out for them or when he sees them and does not avoid them so far as is in his power.—*Murphy v. Orr et al.*, 110.
6. The doctrine of *respondent superior* is not applicable to the State, except when the Legislature has voluntarily assumed it.—*Lewis v. The State*, 114.
7. Claimant was sentenced to the reformatory and while there was injured by reason of defects in implements which he was required to use in his work. *Held*, That he could not recover against the State for such injuries; that the State was not his master in any ordinary sense, and that if while in confinement he sustained injury it must be attributed to the cause which placed him there.—*Id.*
8. While the plaintiff in an action to recover for injuries has the burden in the first instance of showing defendant's negligence, he is not bound to establish a case free from reasonable doubt.—*Seybolt v. The N. Y., L. E. & W. RR. Co.*, 133.
9. A railroad company owes the same degree of care to the clerks and mail agents riding in the postal car as it does to passengers in its other cars.—*Id.*
10. Plaintiff's intestate was a postal clerk who was transported under a pass issued by defendant pursuant to a requisition of a superintendent of the government mail service. *Held*, That intestate was not bound by the conditions on the pass exempting defendant from liability for negligence; that the pass was a mere voucher for the information of defendant's employees and the convenience of the agent and did not constitute a contract between defendant and the person using it.—*Id.*
11. While in actions based on negligence the question of contributory negligence is for the jury, it is not always so.—*Smith v. The N. Y. C. & H. R. RR. Co.*, 230.
12. Where the facts are not disputed the question must be whether inferences can be drawn logically from such facts in any other than one way, and to say whether they can be drawn logically in any other than one way is the province of the court.—*Id.*
13. Upon the facts in this case, *Held*, That the deceased was guilty of negligence, and that upon this point there was no question for the jury.—*Id.*
14. Where the evidence as to whether the statutory signals were giving is conflicting, the question is one for the jury to determine.—*Bronk v. The B. & A. RR. Co.*, 259.
15. Where plaintiff testified that he saw the engine standing still outside the highway, and heard no warning until too late to avoid the accident, *Held*, That the question of contributory negligence was one of fact for the jury.—*Id.*
16. The testimony showed that plaintiff's view of the railway track was obstructed by an embankment and also by a freight train moving on another track; that plaintiff looked and listened before trying to cross the track; and that the train by which she was hurt was close upon her when she first saw it. *Held*, That the question whether the bell was rung was fully raised, and that plaintiff's negligence in not sooner seeing the train was not made out.—*Lake v. The N. Y. C. & H. R. RR. Co.*, 289.
17. Where the driver of a horse and wagon, in trying to avoid an approaching train, strikes the horse so that it starts and throws out an occupant of the wagon, who is thus injured, it cannot be said that the train is not the proximate cause of the accident.—*Id.*
18. Persons driving along a highway have a right to rely on the exercise by other persons of ordinary care and prudence in managing their team while passing.—*Hortle v. Holland*, 312.
19. Plaintiff was injured by a collision with defendant's wagon, caused by the latter's negligence, whereby she was thrown out of the wagon and suffered a miscarriage in consequence of the shock. She was a married woman, but her husband allowed her to enjoy whatever wages or profits she could earn outside of her domestic services. *Held*, That the action was properly brought in her name; that evidence as to what wages or money she could earn before her injuries was admissible and that a verdict of \$200 was reasonable.—*Id.*
20. To entitle a plaintiff to recover present damages for apprehended future consequences of an injury there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.—*Strohm v. The N. Y., L. E. & W. RR. Co.*, 314.
21. Evidence by an expert as to consequences which are "very likely" to result from an injury, or as to what may be developed therefrom, is inadmissible.—*Id.*
22. In an action to recover for injuries evidence as to plaintiff's earnings prior to the injury are admissible.—*Ehrgott v. The Mayor, &c., of N. Y.*, 319.
23. Allegations in a complaint that plaintiff suffered great bodily injury, became sick, sore and disabled, obliged to spend large sums in attempting a cure, was prevented from attending to business, and was other-

- wise injured, are sufficient to authorize proof of any bodily injury resulting from the accident.—*Id.*
24. A wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what such consequences are is to be determined by the jury.—*Id.*
25. Plaintiff's carriage was broken by the accident and he was obliged to procure another and was thereby exposed to the cold and rain. *Held*, That defendant was liable for the injuries sustained, even though they were solely due to his exposure, provided he was free from negligence in the exposure; that the exposure was the direct and proximate result of the accident.—*Id.*
26. Plaintiff's driver with team approached defendant's railroad crossing, his horses walking, where the view up and down the track was obstructed, as plaintiff's driver well knew, and the driver, when about 100 feet from the track, looked both ways up the track as far as he could see, and hearing nothing proceeded, and again when about 60 feet from the track looked one way up the track and as he was about to look the other way his attention was drawn to a boy who was approaching him in the middle of the road, and his attention continued to be directed toward the boy until, when about three feet from the track, the driver heard the whistle of the defendant's approaching train about 40 feet distant, too late to back the horses from the track. The plaintiff's driver could have seen the train if he had looked when some distance farther from the track than at the time when he heard the whistle. The horses were killed and wagon and harness destroyed. *Held*, That the driver was guilty of contributory negligence and plaintiff could not recover. That the driver's attention was directed to the boy to prevent his injury by the team, when it should have been given to the train. He thus abandoned necessary care and caution at a time when it was important that he should have given his direct and exclusive attention to a danger which was commanding, if not imminent.—*Thompson v. The N. Y. C. & H. R. RR. Co.*, 347.
27. In an action to recover damages occasioned by the death of plaintiff's intestate through the alleged negligence of defendant while plaintiff's intestate was crossing the defendant's railroad track, *Held*, It is error for the court to leave it to the jury as a question of fact to determine whether defendant should have maintained a flagman at the crossing, and whether defendant was guilty of negligence because no gate had been erected at this crossing.—*Coyle v. The L. I. RR. Co.*, 353.
28. Plaintiff's intestate was working upon a defective hand car, the handle of which had been broken for two weeks, to the knowledge of the foreman, a crowbar being used in place thereof, which acted irregularly on the walking beam, causing it to break, whereby intestate was precipitated from the car and killed. *Held*, That the questions of negligence and contributory negligence should have been submitted to the jury, and that it was error to non-suit.—*Power et al. v. The N. Y., L. E. & W. RR. Co.*, 408.
29. It is negligence in the master who employs children under 16 years of age to manage dangerous machinery, and the rule that makes all employees assume the risk of the employment does not apply to infants under the prescribed age who are injured in managing dangerous machinery unless such infant by his or her negligence contributed in some degree to the injury.—*Cooke v. The Lalance Grosjean Mfg. Co.*, 482.
30. Plaintiff was about twelve years of age and was employed in defendant's factory where wall paper is made. On November 29, 1882, he was working at heavy machinery and his hand was caught in it and crushed so badly as to necessitate partial amputation. An issue was made upon the question whether or not instruction had been given to the boy as to how he was to do the work. *Held*, That this was a question for the jury without regard to the statute.—*Murphy v. Mairs*, 492.
31. The Court has no power to compel a plaintiff who sues for damages from personal injuries to submit his body to an examination by a physician for the purpose of proving his physical condition on the trial.—*Newman v. The Third Ave. RR. Co.*, 500.
32. Executors, who as such are in possession and control of premises used as a tenement house, are bound to see that the stairways, etc., intended for common use are kept in good repair, and they are personally liable to tenants and strangers lawfully using premises for neglect of that obligation, though under the will they have no right to make repairs at the expense of the estate.—*Donohue v. Kendall et al.*, 506.
33. Plaintiff, who was about to drive across defendant's track in the city of Brooklyn, looked both ways and saw no train, and saw the gate at the crossing raised and the gateman go into his house. He then attempted to cross, without looking again, when his horse was struck by a passing engine and killed. *Held*, That the question of plaintiff's negligence was properly left to the jury; that the raising of the gates was a substantial assurance of safety, and the conduct of the gateman could not be ignored in passing upon plaintiff's conduct.—*Glasing v. Sharp*, 517.
34. The Trustees of the Brooklyn Bridge are not responsible for the accident occurring thereon on Decoration Day, 1883, by reason

of neglect to appoint an adequate police force. The policemen appointed by the Superintendent alone, or after consultation with some of the Trustees, must be held to be regular police authorized to do duty as such.—*Hannon v. Agnew et al.*, 523.

35. The plaintiff in an action against the Mayor, &c., of N. Y. is not restricted in his recovery to the estimated amount of damages stated in the claim filed by him with the Comptroller.—*Reed v. The Mayor, &c., of N. Y.*, 530.

36. The Bridge Trustees are either the agents of the state or of the cities of New York and Brooklyn, and are not the legal superiors of the laborers at work on the bridge, nor liable for their negligence.—*Wulsh v. The Trustees of the N. Y. & Brooklyn Bridge Co.*, 547.

37. The Trustees are responsible only for their own personal misconduct or negligence.—*Id.*

38. One who makes an excavation in a public street with the permission or license of the municipal authorities is not entitled to notice of an action against the corporation brought by one who has been injured by falling into such excavation; the giving of such notice is not a condition precedent to a recovery against him by the corporation, and the omission to do so only places the burden on the corporation of again litigating the actionable facts.—*The Village of Port Jervis v. The First Nat'l Bank*, 565.

See MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 1, 5-7; RAILROADS, 1-3, 5-7, 10, 11.

### NEGOTIABLE PAPER.

1. In an action on a promissory note which stated it was given for cash loaned the answer set up want of consideration. *Held*, That either party could show the true consideration.—*Miller v. Mackenzie et al.*, 109.

2. Where a note is given in part upon an agreement by the payee to render future services the performance of such services furnishes a good consideration for the note although not rendered under a binding contract to perform which could have been enforced by the maker.—*Id.*

3. The recital in a promissory note that it was given for value received and a seal attached thereto are each presumptive evidence that the note was given for a valuable consideration, and to overcome such presumption evidence must be produced that there was no consideration.—*Muzzey v. Cable*, 142.

4. The fact that the note was given by the maker to his wife will not of itself overcome such presumption.—*Id.*

5. A waiver of notice of protest may be made

by parol and is good even when made upon the day of maturity of the note, and a promise to pay made after knowledge of laches in respect to a demand or notice is good.—*Holliday et al. v. Sprague*, 150.

6. G., one of the defendants, who had endorsed the note in question, testified that he was authorized by the other to do so and on cross-examination denied that he had asked one T. to see the co-defendant and get his permission to use the note by turning it out to plaintiffs. T. was then called and asked if G. did not ask him to see S. and get his permission to use the note. This was objected to and excluded.—*Held*, Error.—*Id.*

7. P., the owner of a note in respect to which defendants, although makers, were in fact sureties, gave the same to an attorney for collection, the note being past due. The attorney gave it to a bank, also for collection, which sent the note to a correspondent bank endorsed for collection. Plaintiff, at the request of one of the makers and the principal debtor upon the note, paid the same to the latter bank, but not at the request of any of the sureties and without the consent of two of them. The bank remitted the proceeds to P. In an action upon the note, which had come to plaintiff from the correspondent bank as a voucher for the payment, *Held*, That plaintiff could not recover; that as to the sureties the note was paid and plaintiff's only remedy was against the principal debtor.—*Coykendall v. Constable et al.*, 169.

8. Surrender of a cause of action for money loaned is good consideration for a promissory note.—*The Rome Savgs. B'k v. Kramer et al.*, 337.

9. In an action upon a promissory note the plaintiff produced it in court from his possession and testified that he had received it from one S., to whom it was made for a valuable consideration. S. on the other hand testified that he had transferred it to the plaintiff merely for him to collect. Payment to S., with the knowledge of the plaintiff before the transfer of the note to him was set up as a defense, but evidence to sustain it was ruled out and the court charged the jury that all defenses as to indebtedness between the original parties were shut off; that the testimony upon the point of payment was excluded because the action was not between the original parties, and that they were to say whether the plaintiff had acquired a good title or whether he was not merely intended as a cover to prevent these equities from being set up in the case. *Held*, Error.—*Delafield v. White et al.*, 474.

See AGENCY, 2; ESTOPPEL, 2; EVIDENCE, 10, 21; JOINT DEBTORS, 1; PARTNERSHIP, 10; PLEADING, 9.

## NEW TRIAL.

See *APPEAL*, 20; *PRACTICE*, 1, 15-19, 25.

## N. Y. CITY.

1. The exclusive control over the annexed district given by the Act of 1873 to the Park Commissioners is not exclusive of the city, but of any other officers of the city, and the municipality is liable for their misfeasance or nonfeasance in the discharge of any corporate duty resting upon it.—*Ehrigolt v. The Mayor, &c., of N. Y.*, 819.
2. The provisions of Chap. 147, Laws of 1882, requiring that when proposals for municipal work in the City of New York are invited the department or officer inviting the same shall require, as a condition precedent to the reception or consideration of any proposal, the deposit with such officer or department of a certified check upon one of the national banks of the city of New York, drawn to the order of the comptroller, or money to a certain amount, are not complied with by the deposit of such check or money with the proposal in a sealed envelope in a box kept in the office of the officer or department.—*The People ex rel. Dowdney v. Thompson*, 455.
3. The powers conferred by statute upon the Fire Department of the City of New York to require by proper notice the construction of fire-escapes upon hotels, &c., are clearly constitutional and are to be exercised under the directions of the statutes and in accordance with the sound discretion of the Fire Department, and courts of justice will not interfere with the exercise of those powers unless that exercise is so clearly improper that any intelligent mind can see the plain and manifest injustice and unreasonableness of the demand.—*The Fire Dept. of N. Y. v. Sturtevant et al.*, 548.
4. Under § 2, Ch. 687, Laws of 1881, a notice requiring the owner of a hotel to erect fire-escapes upon it must be issued in the name of the Fire Department of the City of New York and be subscribed by the Inspector of Buildings, and a person upon whom a notice to that effect, subscribed by the Inspector of Buildings, but not issued in the name of the Fire Department, is served is not subjected to any of the penalties provided for its disobedience.—*Id.*
5. The power of the court to order the erection of fire-escapes upon a hotel, &c., depends upon the refusal or neglect of the owner to comply with the requirement of the Fire Department within a prescribed time, and when a notice from said department requiring the erection of five fire-escapes has been served upon the owner and he has failed to comply with it, the court cannot, without the consent of said owner, order the erection of three fire-escapes.—*Id.*

6. By § 189, of the Consolidation Act of 1882, it is made the duty of the Board of Estimate and Apportionment of the City of New York, between the 1st of August and 1st of November, to make a provisional estimate of the amount to be expended by the city government during the following year, and to appropriate certain amounts thereof to the use of the various departments, and by § 207 of said act the said Board is given power to transfer the unexpended balance of any appropriation which may have proved excessive to supply any deficiency which may have arisen by reason of some other appropriations having proved insufficient, but such board has no power to apply such unexpended balances to any purpose for which an appropriation has not previously been made pursuant to § 189 of said act.—*Bird v. The Mayor, &c., of N. Y.*, 571.
  7. The act providing for the appointment of Commissioners of Accounts in the City of New York contains no provision empowering such commissioners to appoint or employ clerks at the expense of the city, and the fact that their duties are such as require clerical aid does not give them that power by necessary implication.—*Id.*
  8. Neither office, nor officer, nor title to salary or pay out of the public funds can exist or arise by implication of facts, without the express enactment of law.—*Id.*
  9. An action cannot be maintained against the City of New York upon a debt incurred by the Board of Excise of that city for the salary of an inspector employed by it unless the creditor has obtained from said Board its requisition on the special fund in the hands of the Comptroller to be paid out upon its requisition and payment of the same has been refused, or unless said Board unreasonably refuses to draw such requisition.—*Gregory v. The Mayor, &c., of N. Y.*, 574.
  10. If the refusal of the Board to draw such requisition is not unreasonable the remedy of the creditor is by mandamus to compel it to do so.—*Id.*
- See *ASSESSMENTS*, 8-9; *DEEDS*, 10; *FIREMEN*; *MUNICIPAL CORPORATIONS*, 4-6; *NEGLIGENCE*, 35; *REMOVAL*; *RIPARIAN OWNERS*; *SHEPHERD'S FOLD*; *STATUTES*, 1, 2; *TAXATION*, 4.

## N. Y. STATE.

See *NEGLIGENCE*, 6, 7.

## NUISANCE.

1. The City of Binghamton, by its Common Council, adopted a map and plan of its Fourth Ward preparatory to sewerage the same. The plan contemplated a main sewer in Carroll street into which many other sewers were to empty. Plaintiff, owner

of property on the bank of the Susquehanna River, near and below the mouth of the proposed sewer, obtained a temporary injunction restraining the construction and use of the sewer. On the trial it appeared that in different years and at different times of the year the bed of the river was alternately wet and dry; that sewage would probably collect and that in the course of two or three years a nuisance would in the ordinary course of events be created which would be dangerous to health; that the use of the sewer by the inhabitants of Carroll street alone would not create such a nuisance; that the proposed system was not the only possible method of draining the ward, and that by another construction sewage would probably be carried off by the river without evil effects. *Held*, That a judgment confining the use of the sewers to the inhabitants of Carroll street was proper.—*Morgan v. The City of Binghamton et al.*, 228.

See INJUNCTION, 8, 9.

#### OBSCENE PICTURES.

1. The testimony of experts is not admissible on the question whether pictures or printed words are obscene or indecent.—*The People v. Muller*, 580.
2. The fact that the original pictures have been publicly exhibited will not, as matter of law, exclude a finding that the photographs sold were obscene and indecent.—*Id.*
3. The intent with which the sale was made is immaterial.—*Id.*

See CRIMINAL LAW, 3, 4.

#### PARTIES.

1. An objection of a defect of parties, when it appears on the face of the complaint, is waived by an omission to demur for such cause.—*Snyder v. Bliss et al.*, 304.
2. A sheriff holding attachments against property involved in an action of interpleader is not a necessary party to it.—*Id.*

See ATTACHMENT, 6, 10; BAR, 1; CREDITOR'S ACTION, 1, 8; GUARDIANS, 1; MORTGAGE, 15, 16; NEGLIGENCE, 19; PLEADING, 23.

#### PARTITION.

1. Whether a sale shall be ordered before any attempt at actual partition has been made is a question to be determined from all the facts and circumstances of the case.—*Odell et al. v. Odell et al.*, 18.
2. Where the property in question consisted of farming land with only one set of buildings thereon and the undivided shares of the owners were respectively subject to mortgage, *Held*, A proper case in which to

decree a sale instead of attempting actual partition.—*Id.*

3. A judgment obtained against an executor cannot create a lien upon the real estate of the testator by its own force, even if there is no personal estate out of which to satisfy it.—*Hibbard v. Dayton et al.*, 152.
4. Where the will of a testator directs the payment of his debts and there is no sufficient personal estate to pay them such payment becomes a charge upon his real estate; and in such a case a judgment creditor of the executor, who is made a party to a partition suit of real estate belonging to the testator in which such real estate is sold under a judgment entered therein, is entitled to have his judgment paid out of the proceeds before they are distributed, if, in the proceedings taken in such action, notice of the claim of such judgment creditor has been given to all the heirs at law and an opportunity given them to contest it.—*Id.*

5. A referee, appointed in partition to take proof, &c. is bound by the pleadings and cannot find the interests of the parties to be otherwise than as stated and admitted in said pleadings.—*McAlear v. Delaney et al.*, 252.

See JURISDICTION, 5.

#### PARTNERSHIP.

1. When several persons enter into an agreement to form a special co-partnership, but do not fulfil the requirements of the law necessary to perfect such a partnership, although the person intended to be created a special partner would be liable to third parties for the debts of the partnership contracted in the ordinary course of business, he is not liable to one of the general partners on a partnership note given to him by the other general partners in consideration of a purchase by them of his interest in the business.—*Corbit v. Corbit et al.*, 77.
2. A referee of the issues in an action between partners for an accounting may make a verbal order that one of the parties file an account. It is not necessary that a formal order in writing or an interlocutory judgment to that effect should be entered.—*Naylor v. Naylor*, 79.
3. In such an action there is no necessity for the referee to order an account of the partnership transactions previous to the time of an actual settlement between the parties, but the party ordered to account has, nevertheless, the right, if it be necessary for the protection of his interests, to go beyond the period named and to furnish an account as a subject for due and thorough consideration in the adjustment of the equities between the parties.—*Id.*



4. One S., a general partner in a firm, desired to become a limited partner and procured a friend to temporarily purchase the stock of the firm, loaning him his check for the amount required. The friend thereupon purchased the stock and gave the check to the firm, which paid it over with other checks to the amount of \$40,000 to S., who then gave a check for \$40,000 as his capital to the new firm. The stock was then repurchased by the new firm for the same price and payment made by check, which was returned to S. in payment for the one loaned. In an action on a note given by the firm, which S. defended on the ground that he was only a special partner, the court excluded evidence offered to show that the bank account of S. was made up of county moneys deposited by S. as County Treasurer. *Held*, Error; that the evidence offered was competent on the question of the good faith of the transaction.—*The Metropolitan Natl. Bk. v. Sirret*, 143.
  5. A person buying a share in an existing business and going on with it without any arrest or settlement of the preceding accounts becomes entitled to his interest as a partner in the debts owing to it at the time of his entering it and equally so liable to contribute to the payment of the indebtedness owing by it at that time; and to bring about this latter result it is not necessary that such indebtedness should have been specifically or in terms assumed by the incoming partner.—*Mores v. The Society for the Protection of Destitute R. C. Children*, 247.
  6. An agreement by which a person participates in the profits only of a business renders such person a general partner as to third persons.—*Clafin v. Hirsch*, 248.
  7. The general rule is that in a co-partnership where one partner gives time, labor and skill and no money, and the other gives only money, each contribution is set against the other, and if there be a failure each loss is to be borne by the loser exclusively without right to contribution.—*Manley v. Taylor*, 386.
  8. The rule will be the same though the member contributing money has but one-fourth interest in the business and the other three-fourths.—*Id.*
  9. In an action to recover for an indebtedness of defendant to a firm of which he was formerly a partner the answer set up an agreement by defendants, in consideration of a transfer of defendant's interest, to save him harmless from liability for the firm indebtedness. *Held*, That the agreement did not preclude proof that on a settlement at the time of such transfer it was found that defendant was indebted to the firm and agreed to pay, or prevent plaintiffs from recovering thereon.—*Finley et al. v. Fay*, 362.
  10. One member of a partnership has no power to bind his copartner by giving the firm note for his own individual debt without the knowledge, assent or authority of his copartner; and the person receiving such note, with knowledge that the firm name was used for such purpose, cannot enforce it against the other members of the firm.—*The Union Nat'l Bk. v. Underhill*, 404.
  11. The rule that the admissions of one partner during the existence of the firm are evidence against his copartner when they relate to partnership transactions does not include admissions or statements which may be designed or expected to have the effect of subjecting the members of the firm to the payment of what appears to have been the individual indebtedness of the partner whose admissions are offered as evidence.—*Id.*
  12. If one partner by a secret transaction within the line of the firm's business derives a private benefit to the detriment of the firm, he will be compelled to account therefor.—*Tolan v. Carr*, 484.
  13. Where plaintiff claims to have been induced to enter into a copartnership by false representations, misstatement of profits and over valuations are not alone enough to force plaintiff to his action. Knowledge of falsity and fraudulent intent are equally necessary.—*Schneider v. Quosbarth*, 527.
  14. Under ordinary circumstances mere delay after discovery of the fraud is not a waiver or an affirmation of the contract.—*Id.*
- See ATTACHMENT, 5, 8; DEPOSITIONS, 1; EVIDENCE, 21; MARRIED WOMEN, 5; PATENTS, 2.

#### PATENTS.

1. A verbal contract to pay the expenses incurred in prosecuting certain experiments to test the utility of an invention, in consideration of receiving an interest in the results obtained by said experiments, entitles the person paying such expenses to an interest in a patent obtained for the invention, and it is not invalid as violating § 4893 of the R. S. of the U. S., requiring an assignment of an interest in a patent to be in writing.—*Burr v. Delavergne*, 573.
2. If a partnership enters into such an agreement and pays the expenses of the experiments, and subsequently one of the partners and the inventor take out a patent for the invention in their joint names to the exclusion of the other partner, the partner so excluded can maintain an action against his copartner to compel him to put the title to such patent in the joint names of the copartners, or if the copartnership have terminated to compel him to assign to his

partner the interest to which the latter may be entitled.—*Id.*

PAYMENT.

See CONTRACT, 13, 20; FRAUD, 8; LIFE INSURANCE, 5; LIMITATION, 2, 5.

PECULATION.

1. Under Chap. 19, Laws of 1875, the value of the property converted is not an element of the crime, and a special finding by the jury of the amount of the loss is not essential to the power of the court to sentence under that act.—*The People v. Bork*, 281.

PENAL CODE.

See ASSAULT, 6; CRIMINAL LAW, 3.

PERPETUITIES.

See WILLS, 13, 23, 28, 33.

PLEADING.

1. When the plaintiff in an action sues a number of defendants on a contract which he alleges to have been made with all jointly, and certain of the defendants answer, denying that the obligation is joint and alleging that the contract was made by them exclusively, they can set up a counterclaim existing exclusively between themselves and plaintiff.—*Clegg v. Cramer et al.*, 28.
2. A complaint in action commenced in August, which alleges that defendant has abandoned and refuses to perform a contract to buy a certain amount of merchandise from plaintiff during the year ending the following November, does not present a cause of action.—*Putnam et al. v. Griffin*, 46.
3. The complaint averred that defendant is a municipal corporation under the laws of New York, naming its territorial location and the residence of its officers, and charged neglect of duty and consequential injury to plaintiff's property. Held, A good complaint.—*Harvey v. The Village of Little Falls*, 48.
4. The court will not strike out from a pleading, on a motion for that purpose, facts alleged that can in any form or relation be material to be proved on the trial.—*Allen v. Allen*, 212.
5. An amendment of a complaint on the trial of an action which strikes out all the allegations contained in it affecting one of the defendants and amounts to a virtual discontinuance of the action as to such defendant should not be allowed except upon payment of all his costs in the action, whether awarded him to abide event upon an appeal from a judgment obtained on a former trial or which accrued in the ordinary way.—*Kent v. Popham*, 241.

6. The defence of a former recovery must, since the Code, be specially pleaded.—*Henderson v. Scott*, 255.
7. When the facts set forth in the complaint are sufficient to constitute and do constitute but a single cause of action, a demurrer to the complaint of a misjoinder of causes of action will not be sustained because the facts in the complaint are divided and a portion set forth as a second cause of action. Such division does not make two causes of action of the facts which constitute but one.—*Welch v. Platt*, 265.
8. An answer must be clearly bad and not calling for deliberation of the issues it attempts to make to support judgment for its frivolousness.—*Wyckoff v. Andrews*, 356.
9. Where the complaint in an action against the endorers of a note does not plead demand, protest and notice, but alleges a waiver thereof "at or about the date of maturity of the note," and fails to allege a promise outside of the note, and the answer alleges that the waiver was not in fact made till after maturity, though defendants supposed the note was not then due, judgment cannot be taken for the frivolousness of such answer.—*Id.*
10. An answer which does not deny any of the material allegations of the complaint nor that the defendant has knowledge or information sufficient to form a belief of either of the allegations contained in the complaint should be stricken out on motion for that purpose.—*The Pratt Mfg Co. v. The Jordan Iron & Chem. Co.*, 378.
11. An objection that may be raised by answer in the nature of a plea in abatement is waived by not being so raised.—*Kroucer et al v. Reynolds*, 388.
12. A cause of action for conversion of personal property and one for money had and received, being the proceeds of sale of said property, cannot be joined in a complaint.—*Teall v. The City of Syracuse*, 400.
13. In an action by a general assignee for conversion of goods of his assignor when, after the service of an answer, the goods in question are removed from the possession of the defendant by a levy and sale under an execution issued upon a judgment obtained against plaintiff's assignor, the defendant should be allowed to serve a supplemental answer setting up that fact, and he also becomes subrogated to the rights of the judgment creditor and is entitled to contest the validity of the assignment.—*Lithauer v. Taggart et al.*, 421.
14. Where in justice's court, matter is set up as a defense and not as a counterclaim, it must be regarded as a defense only.—*Green v. Waite*, 436.
15. Where the complaint, which was verified,

charged defendant with maintaining a house of ill-fame, *Held*, That defendant might omit a verification from her answer and need not serve with her answer an affidavit stating why she claimed that right.—*Anderson v. Doty*, 440.

16. The complaint set forth the incorporation of plaintiff, a mutual benefit association, and that defendant was the treasurer of its grand lodge between the dates therein referred to; that during said time moneys were paid by various branch lodges on plaintiff's account to the financial secretary, from whom it was defendant's duty to collect it; it then proceeds in various counts to charge that defendant either wrongfully converted \$2,000 to his own use during said period, or by wrongful neglect of his office and duty permitted said financial secretary to so convert such sum. *Held*, That defendant was entitled to a full bill of particulars, both of moneys received and paid by him and by said financial secretary, giving dates, amounts, names, etc.—*The Orden Germania v. Decender*, 480.

17. A cause of action that defendant, by false representations, induced plaintiff to sign a bond for the payment to a third person of a certain sum of money and a mortgage on her real estate securing it, which were delivered to such third person, defendant receiving and retaining the money therefor, under Code, § 484, sub. 6, may be joined with a cause of action for conversion, since plaintiff had a property in the bond after execution and before delivery, which was tortiously taken from her by defendant.—*De Silver v. Holden*, 487.

18. An averment that, with intent to deceive plaintiff, defendant falsely and fraudulently represented certain matters of fact as to his property and financial standing, implies a charge that defendant knew the representations to be false, the matters referred to being presumably within his personal knowledge.—*Id.*

19. Though the following "Defendant denies each and every allegation therein (in the complaint) contained, except as herein-after admitted," be not technically correct under § 500 Code, yet if such part of the answer be indefinite and uncertain, the proper remedy would seem to be, not the exclusion of evidence on the trial, but a motion under § 546.—*Spies v. Roberts*, 505.

20. Under such a denial evidence of failure of consideration for the note sued on is admissible in an action by an assignee after maturity.—*Id.*

21. The trial judge has the power to disregard such defects in the answer.—*Id.*

22. Though a denial of each and every allegation of the complaint, except as admitted, qualified or explained, makes no

issue, and though a ruling on the trial denying a motion for judgment thereon must be tested as the answer then stood, no amendment having been asked for, yet if plaintiff fails thereafter to make a case, the General Term, on appeal, should, in the interests of justice, allow an amendment of the answer.—*Hoffman v. The N. Y., L. E. & W. RR. Co.*, 510.

23. In order to take advantage by demurrer of the misjoinder of parties plaintiff, it is necessary that the defendant should not only assign as a ground of demurrer "that there is a misjoinder of parties plaintiff," but should proceed to point out the particular plaintiffs who are misjoined, and state the reason constituting such joinder an improper one. The point that there is a misjoinder of parties plaintiff cannot be taken under a demurrer assigning as a cause "that the complaint does not state facts constituting a cause of action" upon the ground that the complaint shows affirmatively that the cause and right of action are not invested in all the parties plaintiff.—*Berney et al. v. Drezel et al.*, 515.

See APPEAL, 3; CONVERSION, 4, 5; DIVORCE, 3-5; EXECUTION, 5, 6; NEGLIGENCE, 23; SLANDER, 3; TRESPASS, 1.

#### POLICE.

See NEGLIGENCE, 34.

#### PRACTICE.

1. A motion for a new trial on the ground of objectionable conduct on the part of a juror must be made to the Special Term, either upon a case settled or affidavits, or both, and cannot be entertained upon appeal from a judgment and from denial of a motion for a new trial upon the minutes.—*Paulitich v. The N. Y. C. & H. R. RR. Co.*, 73.

2. The defendant, by taking the chances of a favorable verdict, with knowledge of an objectionable act of a juror, and without objecting to it in any way, waives whatever objection might have been made there-to.—*Id.*

3. A motion to set aside an order appointing a receiver in supplementary proceedings is properly made to the court and not to a judge thereof.—*Lippincott v. Westray*, 102.

4. When a motion is made and heard at Special Term, and granted or denied by the Special Term, there can be no right to enter the decision as an order of a judge of the court. If the court had no right to make the order entered, for want of jurisdiction or otherwise, the error should be corrected by an appeal directly from the order, and not by a motion for resettlement.—*Id.*

5. Where there was an oral consent to a sub-

- stitution of attorneys but no order was entered until after notice of hearing was served on the substituted attorney, *Held*. That such notice was irregular, and that a default taken on a hearing upon said notice should not be allowed to stand.—*Wood v. Holmes*, 121.
6. Whether a consolidation of actions shall be ordered rests in the discretion of the court to which the application therefor is made.—*Woodward et al. v. Frost et al.*, 125.
7. Where the second action involves inquiry into numerous issues not embraced in the first action a denial of an application to consolidate the actions is proper.—*Id.*
8. In such a case an injunction to restrain prosecution of the first action will not be granted, as the plaintiffs in the second action may upon application be made parties to the first action and so protect their interests.—*Id.*
9. Evidence as to facts not found by a referee and as to which no finding was requested cannot be considered for the purpose of reversing the judgment.—*Burnap v. The National Bank of Potsdam*, 157.
10. A judge has no authority to correct an error in an order made by him unless the parties are before him in pursuance of some legal process, or unless, being present, they consent that the subject may be judicially considered.—*Simmons v. Simmons*, 234.
11. The findings of a referee against the clear and decided preponderance of testimony will not be sustained, and a judgment based thereon will be reversed.—*Gardner v. Gardner*, 249.
12. Under § 1207 of the Code of Civ. Pro. the trial judge has the power, if his attention is called to the fact that a verdict rendered exceeds the amount demanded in the complaint, to order an amendment of the complaint so that such verdict will not exceed the demand, but it is doubtful whether the General Term possesses the power to make such an amendment upon an appeal.—*Jencks v. Van Brunt*, 278.
13. Where the attention of the trial judge is not called to a slight excess in the verdict over the amount demanded in the complaint, and no suggestion is made of that fact until the argument of an appeal, the General Term will exercise its discretion as favorably to the plaintiff as possible, and will not reverse the judgment and order a new trial unless the excess should be deducted without costs of the appeal to either party, but will reduce the judgment by deducting the excess as of the date of the verdict, and, as so reduced, will affirm the same, with costs.—*Id.*
14. It is not error to allow the reduction of a  
Vol. 19 No. 20c.
- verdict after it is entered to the amount of damages claimed in the complaint.—*Earl v. Collins*, 307.
15. When the complaint in an action is dismissed upon defendant's motion, before any evidence is taken in the case, upon the ground that it does not state facts constituting a cause of action, the court has jurisdiction to entertain and determine a motion made by the plaintiff at the same term, upon his exception to such dismissal and upon the judge's minutes, to vacate and set aside the order dismissing the complaint and for a new trial, and is not precluded from so doing by § 999 of the Code of Civ. Pro.—*Emmerich v. Heffernan*, 351.
16. Section 999 of the Code of Civ. Pro. is not exclusive, and does not deprive the courts of the authority to order new trials, invested in them, which has not been derived from or made dependent upon the Code, and within that authority courts have the power to correct or set aside their judgments inadvertently made or given, particularly when the correction may be made during the same term.—*Id.*
17. A new trial will not be ordered on the ground that counsel was surprised at the ruling of the trial judge upon a point of law.—*Anderson v. The Market Nat'l Bk.*, 378.
18. The law exacts great diligence from parties in discovering and obtaining their evidence, and if they fail to exercise it and are defeated because of that failure, the result cannot be avoided by an application for a new trial on the ground of newly-discovered evidence.—*Id.*
19. If, after the trial of an action and verdict against the defendant, facts are discovered by the defendant which would have constituted a defense, and which were not connected in any form with the subject-matter of the action or of the plaintiff's claim as it was made and understood in the action, but were entirely extraneous and outside of the investigations which would ordinarily be expected to be made in the course of such a controversy, and formed other and distinct transactions in which neither the defendant nor his counsel participated, a new trial will be granted, upon the defendant's application, to allow him to prove such facts in defense, and he will be permitted to amend his answer so as to set them up.—*Id.*
20. To entitle the court to set aside a verdict for excessiveness, especially in a case in which punitive damages may be awarded, it must be so excessive as to make it apparent that the jury were improperly influenced or that they must have acted from passion, prejudice, or corruption.—*Hinman v. Hare*, 441.
21. In respect of all questions objected to

generally, the exception is valueless where it is apparent or can be reasonably inferred that, if the ground of objection had been stated, it could have been in anywise obviated so that the answer could be made admissible; but where it is clearly apparent that the question relates to an immaterial matter and is of a character wholly inadmissible, irrespective of any objection that could be obviated, there a general objection is the basis of a good exception.—*Id.*

22. Where a case upon the day calendar of the court has been adjourned several times at the request of the plaintiff, who had not objected to the case proceeding on either of the occasions of applying for an adjournment upon the ground that no notice of trial had been served by the defendant, and the case is finally set down peremptorily for a certain day, and on that day a jury is empanelled without the above objection on the part of plaintiff, and the Court directs the counsel for the plaintiff to proceed, and he refuses to do so, the Court has the power to dismiss the complaint, notwithstanding the fact that no notice of trial has been served by the defendant.—*Habersleh v. Fischer*, 458.

23. Rule 32 of the Supreme Court, as to the time of submitting requests to find, may be waived by the consent of parties and the approval of the judge who tries the case.—*In re will of Chauncey*, 457.

24. In an equitable action—e. g., for dissolution of partnership and an accounting—where special issues are sent to a jury, the interlocutory and final decrees rest upon the findings at Special Term, without regard to those made by the jury, which latter are in aid of the equity court and may be disregarded by it, and are not matters of review except so far as included in its findings.—*Schneider v. Quosbarth*, 527.

25. Under the general power of the court to correct and set aside its orders and judgments it has power to vacate at the same term an order dismissing a complaint and grant a new trial.—*Emmerich v. Heffernan et al.*, 542.

26. The verdict of a jury on a specific issue submitted to them in an equity action is not obligatory upon the court on the trial of the entire case; nor will a motion for a new trial on the minutes after the verdict and its denial preclude the court from disregarding the verdict.—*Learned v. Tillotson*, 545.

27. Section 1023 of the Code of Civ. Pro., providing and directing that the court shall, at or before the time when the decision is rendered, note in the margin of a statement of proposed findings of facts and conclusions of law previously submitted to it the manner in which each proposition has been disposed of, and must either file or return

to the attorney the statement so noted, is mandatory and no authority has been given to disregard it when the propositions may be considered not to be either important or material. When the court refuses to act upon propositions presented to it upon the ground that they are unnecessary, the General Term will send the case back to have them passed upon and noted.—*Goetting v. Biehler et al.*, 555.

28. An exception to "each of the conclusions of law" in a finding by a referee is too general to be availing.—*Hepburn v. Montgomery et al.*, 560.

As to practice on appeal, see APPEAL, 4, 5, 7-9, 11-15, 19-21, 24, 25.

As to practice in criminal cases, see CRIMINAL LAW, 1, 3-6; JURORS, 3; PECULATION.

As to practice in different classes of cases, see those titles, as ATTACHMENT, 1, 10; CERTIORARI; CONTEMPT, 1, 4, 7-10; DIVORCE, 8; EJECTMENT, 3; EMINENT DOMAIN, 2; EXTRADITION, 2, 3; FIRE INSURANCE, 5; HABEAS CORPUS; MALICIOUS PROSECUTION; PARTITION, 1, 2, 5; TRESPASS, 1.

See also ATTACHMENT, 4; BONDS, 6; CONSTITUTIONAL LAW, 8; CORPORATIONS, 20; COSTS, 4, 5; DEEDS, 4; DEPOSITIONS, 2, 5, 9, 10; DISCOVERY, 2, 3; DRAINAGE; EVIDENCE, 12, 14, 20, 23; EXECUTORS, 8, 9, 26; HIGHWAYS; INSPECTION; JURISDICTION, 1, 2, 4, 5; JURORS, 5; LUNATICS, 2; MANDAMUS; MASTER AND SERVANT, 6-8; NEGLIGENCE, 1, 4, 8, 11-15, 24, 27, 28, 30, 33; NEGOTIABLE PAPER, 9; PARTNERSHIP, 2, 3; PLEADING, 4, 5, 19, 21, 23; RECEIVERS, 4-8; REFERENCE, 1, 2, 4-6; SHERIFFS, 1, 2; SLANDER; STAY; SUPERVISORS, 3, 4; TAXATION, 5; TRUSTEES, 4; UNDERTAKING, 4; VENUE, 2.

#### PRE-EMPTION.

See RIPARIAN OWNERS, 2, 3.

#### PRINCIPAL AND AGENT.

See AGENCY.

#### PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 13, 24.

#### PROBATE.

See WILLS, 1, 2, 5, 6, 14, 15, 17-20, 24, 25, 34, 35, 37, 38.

#### PROTEST.

See NEGOTIABLE PAPER, 5.

#### PUBLICATION.

See SERVICE.

## RAILROADS.

1. Acts, though entirely proper in themselves in the prosecution of the company's business, may be performed so unnecessarily and carelessly as to constitute negligence on the company's part.—*Lenhart v. The N. Y., L. E. & W. RR. Co.*, 17.
  2. As to persons lawfully traveling the public streets it is the duty of a railroad company to provide appliances without defect and reasonably adequate and safe, but negligence in this regard is not shown by proof that the horses by which plaintiff was injured were fastened to the car by means of a ring and hook in such manner that when frightened they detached themselves from the car and in running away inflicted the injuries complained of.—*Black v. The 42d St. & Grand St. Ferry RR. Co.*, 24.
  3. Plaintiff's intestate, an employee of defendant, was killed by a collision with a train which came from the rear of the train on which he was working, the forward car being forced up on to the caboose crushing intestate, who was on the platform. It appeared that the buffers of the cars were at different elevations and did not meet properly. *Held*, That the primary cause of the death being the failure of defendant to supply proper buffers it was liable and was not absolved from liability by the negligence of its employees on the other train.—*Ellis v. The N. Y., L. E. & W. RR. Co.*, 34.
  4. On foreclosure of a mortgage of the Erie R. Co. its property, etc., was bid in by trustees and the defendant company organized pursuant to Chap. 480, Laws of 1874, as amended in 1876, the certificate providing that stockholders of the old company might be let in upon making certain payments on their old stock within a time to be limited, which as finally fixed was Oct. 31, 1878, and notice of the time limited was published in newspapers in England, Scotland, Ireland and this State. Plaintiffs did not make a demand to be let in accompanied by money until after the time limited. In an action to compel a delivery of stock in the new company, *Held*, that plaintiffs could not recover; that a compliance with the plan within six months from the foreclosure sale was a condition precedent, from the performance of which equity could not relieve them.—*Vatable et al. v. The N. Y., L. E. & W. RR. Co.*, 178.
  5. It is the duty of a railroad company to construct its road, bridges, &c., of the best material and to use the utmost care and vigilance in keeping them in safe condition. The use of combustible material in the construction of an embankment requires increased care and diligence in keeping the roadbed and track in safe condition for use and preventing accidents by fire.—*Near v. The D. & H. Co.*, 308.
  6. A neglect to keep the roadbed and track in the best condition renders the company liable for any injury caused thereby, unless it is shown that the defect could not be discovered by any reasonable skill or foresight.—*Id.*
  7. When a judgment entered upon a verdict in an action for a personal injury will not be reversed on the ground of excessiveness of damages.—*Id.*
  8. The right to institute the proceeding provided for by Ch. 237, Laws of 1869, so far as the company's status is concerned, is established *prima facie* by showing that the petitioner is a company actually owning or operating a steam railroad.—*In re application of the N. Y. C. & H. R. RR. Co. v. Pierce et al.*, 367.
  9. The company's determination that the land is necessary for the purposes of the company is sufficiently shown by its action in instituting the proceeding.—*Id.*
  10. If an employee is injured by the sudden starting or uncontrolled speed and motion of an engine, caused by its being defective or out of repair, and the corporation has notice of such defect, it is liable for such injury, and it is no defence that the engineer might have so managed the engine as to have prevented the injury.—*Murphy v. The N. Y., L. E. & W. RR. Co.*, 414.
  11. Railroad companies are bound to protect their employees who are required to couple cars by providing safe and strong bumpers, and this duty is not dependent upon the fact whether or not the cars are owned by them.—*De Kay v. The N. Y., L. E. & W. RR. Co.*, 479.
- See BONDS, 5; MASTER AND SERVANT, 9, 10; NEGLIGENCE, 1, 2, 8-10, 14-17, 26-28.

## RECEIPT.

See ACCORD.

## RECEIVERS.

1. A receiver of a corporation is not entitled to the proceeds of a judgment for costs entered on the dismissal of the complaint in an action brought against the corporation before his appointment, but which was not determined and the judgment entered until afterward.—*In re petition of Baily*, 11.
2. Such judgment for all ordinary legal purposes is the property of the attorney who defended the action for the corporation.—*Id.*
3. A person appointed receiver of an insolvent corporation to succeed a former receiver, deceased, is not entitled to charge commissions on the amount in the hands of the former receiver, to the custody of which he succeeds, as for collecting and paying out the same. He is only entitled to commis-

sions on such sum for paying it out.—*In re Atty.-Gen. v. The Continental Life Ins. Co.*, 81.

4. A receiver of certain property of a corporation appointed in an action to foreclose a mortgage covering such property can move to vacate the appointment of a receiver of such corporation appointed in a creditor's action to sequester the property of the corporation, to which the receiver in the foreclosure action is not a party, if such appointment is void and injuriously affects him in the discharge of his duty as such receiver.—*Whitney et al. v. The N. Y. & Atlantic RR. Co.*, 236.
5. Having made such a motion he is entitled to notice of any proceedings which may afterwards be taken for the purpose of rendering it ineffectual, and consequently an order confirming the appointment of the receiver in the creditor's action, made without notice to him while his application to vacate such appointment is pending and undetermined, is of no effect.—*Id.*
6. An action under § 1784, Code Civ. Pro., to procure the sequestration of the property of a corporation is within the terms of § 8 of Chap. 378, Laws of 1883, requiring all motion papers, &c., in certain actions relating to corporations to be served on the Attorney-General, and an appointment of a receiver in such action without notice to the Attorney-General is void. A suit for the foreclosure of a mortgage on the property of a corporation does not come within the terms of said statute and a receiver can be appointed therein without notice to the Attorney-General.—*Id.*
7. A receiver appointed in a creditor's action brought under § 1784, Code Civ. Pro., to sequester the property of a corporation can be invested with title only to its real and personal property, things in action, contracts, and effects so far as they are owned by the corporation at the time of his appointment, and an order vesting in him its stocks, bonds and franchises, and property encumbered by a mortgage is unauthorized to that extent.—*Id.*
8. A claim against the assets of an insolvent insurance company for disbursements and legal services rendered to a receiver of said company who died before the taking effect of Chap. 378 of the Laws of 1883 is not required by said act to be presented to, and considered, and passed upon by the General Term in the first instance. The laws and practice in force prior to the passage of said act apply to such a claim, and its payment can be properly ordered by the Special Term.—*The Atty.-Gen. v. The Continental Life Ins. Co.*, 385.

See APPEAL, 2; CORPORATIONS, 17; PRACTICE, 3; SET OFF, 1.

## RECORD.

See MORTGAGE, 2.

## REDEMPTION.

1. A creditor whose judgment is procured after his debtor has made a general assignment for creditors has no lien on the debtor's real estate and is not entitled to redeem.—*The People ex rel. Short et al. v. Bacon*, 129.
2. Where a judgment creditor wishes to redeem from a sale of real property by a sheriff he must pay the amount bid on the sale with interest. It is not enough to pay the amount due on the judgment under which the sale was had.—*Youmans v. Terry*, 269.

See EXECUTION, 4; TAXATION, 5, 10.

## REFERENCE.

1. A general exception to "each of the conclusions of law" in a referee's report raises no specific question.—*Hepburn v. Montgomery et al.*, 26.
  2. A general exception to a referee's report which contains a correct proposition is of no avail.—*Id.*
  3. Plaintiff, an attorney, rendered services in one action during six years, and the items of his account, including disbursements, were sixty in number. The answer set up various payments to him during a long period. *Held*, That the action was not one which, within the meaning of the Code, would require the examination of a long account on either side, and that a compulsory reference was improper.—*Benn v. The First Nat'l B'k of Elmira*, 206.
  4. A general exception to a referee's findings is unavailing unless all the rulings embraced in it are erroneous.—*Riley v. Sexton et al.* 308.
  5. It is the duty of a party seeking to question a referee's finding of law to request and obtain proper findings of fact.—*Drury v. Wigg*, 417.
  6. A referee is not bound to give credence to the testimony of interested parties, though uncontradicted.—*Id.*
  7. A referee to sell in foreclosure can recover for his services, as such, no more than the fees prescribed by the statute of 1869 (and 1874), though an express agreement to pay a larger sum was made.—*Brady v. Kingsland*, 461.
  8. Whether said act is constitutional, *quære*.—*Id.*
- See CONTEMPT, 1; COSTS, 6; HIGHWAYS, 2; INJUNCTION, 7; PARTITION, 5; PARTNERSHIP, 2, 3; PRACTICE, 11.

## RELEASE.

See ASSIGNMENT FOR CREDITORS, 2.

## RELIGIOUS CORPORATIONS.

See ASSAULT, 5; WILLS, 43, 44.

## REMOVAL.

1. Relator, who was chief clerk in the Bureau of Inspector of Buildings, gave verbal permission to one H., during the absence of the inspector, to proceed with the work of making an addition to a frame building pending the approval of the inspector. Immediately thereafter he sent an examiner, who found that the work was begun and that the description in the application was inaccurate, whereupon the permission was revoked. The inspector subsequently approved the plans on condition that the premises be made to conform to the description in the application. Relator had authority in the absence of the inspector to give such verbal permission, but was not instructed to dispense with a preliminary examination. He was removed on charge of having given such permission before an examination and before the plans had been approved by the inspector. *Held*, That there was no substantial ground for his removal.—*The People ex rel. Dumahaut v. Fire Comrs.*, 387.
2. A notice to one of the regular clerks in the Department of Docks of the city of New York, informing him that "the board deem him incompetent for the proper and creditable performance of the duties assigned to and required of him," and appointing a day for him to appear before the board and "show cause and make such explanation as he may desire as to why he should not be removed from his position of clerk in the department," does not comply with § 48 of Chap. 410, Laws of 1883, by informing of the cause of his proposed removal.—*The People ex rel. Dickel v. Comrs. of Docks*, 552.
3. A general charge of "incompetency" in such a notice, without specifying the particulars in which it consists, does not comply with the said statute.—*Id.*
4. If at the time specified in such a notice the clerk is prevented from appearing before the board by serious illness and notifies the board of that fact before such time, but they nevertheless proceed to remove him, no opportunity for explanation is allowed him as required by the said statute.—*Id.*

See FIREMEN, 1, 2.

## REPLEVIN.

1. In an action to recover chattels plaintiff's affidavit alleged that she was entitled to the possession by virtue of a special property

in said chattels, to wit, as sole legatee of D.; that D. died seized and possessed of the property which formerly was in the possession of his executor and that the executor had absconded. *Held*, That the affidavit was defective and contained no facts showing a special property.—*Donald v. Rockwell*, 192.

2. In order to maintain replevin plaintiff must show a right to have delivery of the property at the time of issuing the writ.—*Harris v. Lyman et al.*, 359.

See ARREST, 3, 6, 7; DEPOSITIONS, 2, 3; TAXATION, 3.

## RESCISSION.

See CONTRACT, 15, 18.

## REVIVOR.

See CORPORATIONS, 16-18; DOWER, 1, 2.

## RIPARIAN OWNERS.

1. Under the Harlem patent of 1666 the river line was at high-water mark and the grant did not include the tideway or land between high and low-water mark, of which the city, under the Dongan charter, became the absolute owner of the whole circuit of Manhattan Island.—*The Mayor, &c., of N. Y. v. Hart et al.*, 283.
2. The act to designate the persons entitled to purchase lands under water by its literal terms gave a pre-emptive right only to those owners of the upland who had previously acquired by grant from the city the tideway in their front, save in the case of an upland owner in whose front there was no tideway.—*Id.*
3. The owner of the upland, though he have no statutory right of pre-emption in the tideway in front, has such an equity or first preference in it, recognized by the city in the sinking fund ordinance, that the city having given him a deed of such tideway cannot then say he was not within the terms of § 11 of the ordinance.—*Id.*

## SALARY.

1. A person who has been appointed to fill a public office from which another person has been removed by proceedings which are subsequently adjudged, on certiorari, to have been invalid and void, is privy to and bound by such judgment, although he was not a party thereto; and the person so removed can maintain an action against him to recover the salary received by him while holding such office without previously securing a judgment of *ouster* against him in a direct action between them in the nature of a *quo warranto*.—*Nichols v. Mac Lean*, 96.

See N. Y. CITY, 8-10.



## SALE.

1. A purchaser of real property at a foreclosure sale will be relieved of his purchase when it appears that a tenant under a lease of a portion of the property was by its terms entitled to remove a brick building situated thereon, when the only notice of the lease given in the terms of sale was that the sale would be made "subject to a lease of the present upland of said property, to expire May 1, 1884."—*Beckenbaugh v. Nally et al.*, 94.
2. At a sale by the receiver of an insolvent bank plaintiff purchased a claim against defendant for balance due said bank of \$5,629.28, the certificate of sale stating that fact. It appeared that one of the items supposed to make up that sum was a draft sent for collection, but which had not been collected. It also appeared that there was a larger balance due, which had been confiscated by the Government, but that the confiscation proceedings had since been judged invalid. *Held*, That plaintiff having purchased for a good consideration became vested with title to any indebtedness from defendant to said bank up to the sum mentioned in the certificate.—*Ellis v. The Phoenix National Bank*, 183.

See ARREST, 3; EXECUTORS, 20, 21; FRAUD, 9; PARTITION, 2.

## SAVINGS BANKS.

See BANKS, 3, 4.

## SERVICE.

1. A statement in an affidavit on which an application is made for an order of publication of the summons, that "deponent has not been able to find the defendant within this State, though he has searched and inquired for him at all the places therein where said defendant would be most likely to be found," does not show that personal service of the summons cannot with due diligence be made within the State.—*Putnam et al. v. Griffin*, 46.
2. The fact that an attachment granted in an action has been vacated is no ground for vacating an order of publication subsequently obtained.—*Id*

## SET-OFF.

1. Defendant's original right of set-off is not affected by the appointment of a receiver of the plaintiff.—*Hepburn v. Montgomery et al.*, 26.
2. An insurance company issued certain paid-up endowment policies on defendant's life, but failed before they became due and payable. At that time it held a past due note of defendant's and a claim against him for money had and received. In an action by

the receiver on such note and claim, *Held*, That the whole reserve value of the policies was not, at the time of plaintiff's appointment, due defendant in such sense that he could offset it; that it was not a case of mutual credits within the meaning of 2 R. S., 47, § 36.—*Newcomb v. Almy*, 260.

3. B. procured a County Court order offsetting two judgments in his favor and against K. against K.'s judgment against him; before either judgment was entered K. had assigned all his interest in the costs in the action which he ultimately won to W. On appeal by K. alone from that order, *Held*, That the order must be affirmed.—*Beck v. Kibble*, 382.

See CONTRACT, 3; COSTS, 2.

## SEVERANCE.

See ASSESSMENTS, 5; JOINT DEBTORS, 1.

## SEWERS.

See NUISANCE.

## SHEPHERD'S FOLD.

1. Section 10, Art. 8 of the Constitution has reference to money raised by general taxation throughout the State, or revenues of the State or moneys belonging to the State treasury or payable out of it, and not to money raised by ordinary local taxation for local purposes to be disbursed by the local authorities.—*The Shepherd's Fold v. The Mayor, &c., of N. Y.*, 299.
2. The moneys authorized by Chap. 269, Laws of 1871, to be raised and paid to plaintiff were not moneys of the State within the meaning of that section of the constitution.—*Id*.

## SHERIFFS.

1. Under the statute authorizing the taxation of sheriff's fees the plaintiff, as well as the defendant, has the right to require the sheriff to have his fees on execution taxed.—*Mallory v. Reichert*, 19.
2. The court at Special Term has the authority to make such taxation under its general jurisdiction over all actions pending in the court and after process issued therein.—*Id*.
3. To entitle a sheriff to poundage on an execution he must show either the collection of the moneys called for or some interference with his execution of the process that is equivalent thereto.—*Flack et al. v. The State*, 83.
4. An arrest on a body execution does not operate as a satisfaction of the judgment, but simply as a suspension for the time being of other remedies, and hence the

sheriff is not entitled to poundage where no moneys are collected and the debtor dies before being discharged.—*Id.*

5. A deputy sheriff and the sureties on his bond are not accountable to the sheriff for the consequences of an act explicitly directed by the latter, or by the undersheriff whom the sheriff has instructed his deputies to obey.—*Connor v. Keese et al.*, 181.
6. It seems that a deputy sheriff and his sureties on a bond which waives notice of any action brought against the sheriff for any act of said deputy, and stipulates that any judgment against the sheriff obtained therein shall be conclusive evidence of their liability to him, are not liable for the costs and expenses of appeals from said judgment to the General Term and Court of Appeals, unless they are notified of such appeals and their consent to prosecute them obtained.—*Id.*
7. Sections 1421-1425, Code Civil Procedure, are not unconstitutional. The right of action of the injured party is not thereby taken away or rendered ineffectual, but its enforcement is simply confined to the actual trespassers.—*Hein v. Davidson*, 176.
8. The right to sue a specific individual is not a constitutional right which cannot be taken away where adequate and complete protection to the right of property is left.—*Id.*
9. The admissions of a deputy sheriff having charge of the sale of certain property upon execution issued to the sheriff, as to the amount realized upon the sale, is an admission by an agent as to the business of the agency and is competent as evidence against the sheriff.—*Salter v. Bove*, 292.
10. A judgment creditor procured himself after the return of his execution unsatisfied to be appointed receiver in supplementary proceedings of his judgment debtor's property, and as receiver sued the sheriff for a surplus remaining in his hands after satisfying certain executions by a sale of the judgment debtor's property. *Held*, That it was no obstacle to the plaintiff's recovery that the sheriff had returned unsatisfied executions prior to plaintiff's and subsequent to those satisfied larger in amount than plaintiff's judgment; that the fact that there had been a previous sale to the one upon which the surplus had been realized, which was set aside as irregular, and that afterwards and subsequent to the second sale such order setting aside the first sale has been reversed on appeal, the purchaser on both sales being the same person, was no defense to the sheriff; the purchaser in the first sale assented to the second sale and does not complain; that the fact of the existence

of a general assignment by the judgment debtor prior to the time when the surplus arose, and which since the commencement of this action had been declared void by judgment, was no defence to the defendant, and that the plaintiff can recover the whole surplus, though in excess of the amount of his judgment.—*Id.*

See BAR, 1 ; PARTIES, 2.

#### SLANDER.

1. Facts which go in mitigation of damages must be pleaded in slander. Therefore, *Held*, That, where no mitigation was pleaded, evidence as to plaintiff's reputation for chastity was properly excluded.—*Blanchard v. Tulip*, 145.
2. In an action of slander for imputing unchastity to a female where the defences were justification and mitigating circumstances, *Held*, That a married woman might testify that plaintiff's physical appearance was that of a pregnant woman; that the witness was competent and the evidence proper in mitigation.—*Sturges v. Wiltsie*, 266.
3. The answer set up in mitigation many facts which tended to show that defendant had grounds for believing the truth of the charge, and much evidence was given on the trial by defendant's witnesses in regard to these facts. *Held*, That under Code, § 535, it was proper for defendant to plead the facts, and that as he had given some evidence to support them, it was error in the court to charge that if defendant set up these facts without knowing that he would be able to prove the truth of them the jury might take that circumstance to augment plaintiff's damages.—*Id.*

#### STATUTE OF FRAUDS.

See CONTRACT, 24 25 ; FRAUD, 11.

#### STATUTES.

1. It does not follow, because by the act of 1882 the local laws of New York City are consolidated into one act, that a prior local law has been repealed, unless this is done expressly or by necessary implication.—*The Mayor, etc., of N. Y. v. Buell*, 446.
2. The act of 1882, authorizing the Common Council to pass ordinances for licensing intelligence offices and to fix the license fees, has not been repealed by the Consolidation act of 1882; and any person keeping an intelligence office without procuring a license is subjected to the penalty of \$50 prescribed by the city ordinances.—*Id.*
3. The repeal of a statute terminates all proceedings under it which are not fully completed, unless there is a saving clause exempting them from the operation of the repeal.—*Bingham v. Burlingame*, 447.

4. Chap. 245, Laws of 1880, preserves any right lawfully accrued prior to the taking effect of the act, but the new remedy provided by the Code must be followed.—*Id.*

See ASSESSMENTS, 2, 6; CONSTITUTIONAL LAW; MEDICAL COLLEGES; REMOVAL, 2-4.

#### STAY.

1. An application to stay proceedings pending an appeal under §1312 can only be made to the court from which the appeal was taken, except where the appeal is in the same court which rendered the judgment, or where the appeal is taken under Titles 3 or 5 of Chap. 12 of the Code.—*Hills v. The Peekskill Sav'gs Bk.*, 112.
2. Proceedings will be stayed in an action brought by an assignee under a general assignment to have a portion of a decree made upon his accounting, charging him with certain sums payable to defendant, declared satisfied by a compromise with said defendant, when it appears that, prior to the commencement of such action, the defendant therein had commenced an action against the assignee and the sureties on his bond to secure the performance of the trusts created by the assignments in which the assignee had interposed an answer alleging payment of defendant's claims under the terms of the said compromise.—*Jung v. May*, 140.
3. One W. conveyed by deed of full covenants and warranty certain realty to defendants, who executed to her a purchase money mortgage. Said W. assigned the bond and mortgage to plaintiff's testator, who commenced an action of foreclosure. Prior to such action, an action of ejectment had been commenced by one C. against defendants to recover possession of said premises on the ground that said W. was not seized in fee of the same when her conveyance to defendants was made. The action in ejectment was awaiting decision in the Court of Appeals. *Held*, That a stay in the foreclosure proceedings pending the ejectment suit was properly granted.—*Matthews v. Shaffer et al.*, 456.

See UNDERTAKING, 8.

#### STOCK EXCHANGE.

See BANKRUPTCY, 1, 2.

#### STOCKS.

1. On April 28, 1878, the N. Y., L. E. & W. RR. Co. purchased the property and franchises of the Erie R. Co. in pursuance of a plan or agreement of purchase in which it was provided, among other things, that the N. Y., L. E. & W. RR. Co. should create preferred stock to an amount equal to the preferred stock of the Erie RR. Co., and that preferred stock of the latter company,

in respect of which \$3 in gold for each share had been paid, might be exchanged for an equal amount of the preferred stock of the former company. On February 27, 1878, the plaintiff, who was the owner, as executor, of 100 shares of the preferred stock of the Erie RR. Co., paid \$3 in gold on each of said shares, and procured the evidence of such payment to be stamped upon his certificate of stock. On Nov. 29, 1881, the directors of the N. Y., L. E. & W. RR. Co. passed a resolution that the books of said company should be closed on the 31st Dec., 1881, and that a dividend was declared upon the preferred stock, which should be paid on and after Jan. 16, 1882, to the preferred stockholders registered as such at the closing of the books. Plaintiff did not surrender his certificate of stock of the Erie RR. Co. and receive a certificate of stock of the N. Y., L. E. & W. RR. Co. until Jan. 17, 1882, when he demanded the dividend, which was refused. *Held*, That he was entitled to the dividend.—*Ellsworth v. The N. Y., L. E. & W. RR. Co.*, 211.

See CORPORATIONS, 2-6, 28; RAILROADS, 4.

#### SUBROGATION.

See MORTGAGE, 2; PLEADING, 13.

#### SUPERVISORS.

1. Power and duty of a Board of Supervisors in auditing and allowing the costs and expenses incurred by that body in making defence to an appeal taken by the Supervisors of certain towns to the State Assessors under the act of 1859 (Ch. 312), "to equalize the State tax among the several counties of the State" and the amendment of 1880.—*The People ex rel. Burhans et al. v. Supervisors of Ulster Co.*, 272.
2. What items of "costs and expenses" of such appeal are properly allowable by the Board of Supervisors.—*Id.*
3. The authority to audit in such a case is conferred upon the Board of Supervisors, not upon the court; and when an audit of the bills for costs and expenses of the appeal has been made by the Board in a regular and orderly manner, such audit is conclusive upon the court upon certiorari to review the action of the Board.—*Id.*
4. It is not a valid objection to the action of the Board of Supervisors in auditing such bills that the statute under which they act makes them judges in their own case.—*Id.*
5. Boards of Supervisors may make rules for the conduct of their proceedings, and such rules are a law to the supervisors and all persons dealing with them.—*The People ex rel. Burch v. Mills*, 284.

#### SUPPLEMENTARY PROCEEDINGS.

See EVIDENCE, 3; PRACTICE, 3.

SURETYSHIP.

See BONDS, 6; GUARDIANS, 3, 4; MORTGAGE, 6; SHERIFFS, 5, 6; UNDERTAKING.

SURROGATES.

1. When a surrogate declines to exercise a conceded jurisdiction, and to act until the happening of a contingency which may never happen, for an inadequate or indefensible reason, a writ of mandamus may properly issue to command the surrogate to exercise jurisdiction with respect to such matters within his jurisdiction upon which he declines to act.—*The People ex rel. Morgan et al. v. The Surrogate of N. Y.*, 138.
2. A justice of the Supreme Court, while sitting as Surrogate, is entitled to the benefit afforded to the surrogate by § 2545, Code of Civ. Proc.—*In re will of Charuncy*, 457.
3. § 2490, Code of Civ. Proc., does not prevent such justice from exercising the power that the surrogate could exercise in such a case.—*Id.*

See APPEAL, 1, 8, 10, 11, 13, 14; EXECUTORS, 7, 26; GUARDIANS, 1, 2; STATUTES, 3, 4.

TAXATION.

1. The fact that the town authorities have paid over only a portion of the taxes assessed and collected of a railroad does not change the duty imposed upon the County Treasurer by Chap. 283, Laws of 1871, nor excuse him from applying the moneys actually received to the purposes specified in the statute, nor does such fact confer any right upon the county to use said money for its own purposes.—*Hand v. The Board of Supervisors of Columbia Co.*, 40.
2. A warrant for the collection of a tax is regular on its face although the figures indicating the amount of the tax and the value of the property in the appropriate columns do not have the dollar sign before them, a line in one case and a decimal point in the other separating the figures.—*The American Tool Co. v. Smith*, 52.
3. The proper way to proceed in case property seized under a warrant for the collection of a tax is unlawfully replevied is a motion to set aside the replevin proceedings.—*Id.*
4. An error made by the assessors of New York city in giving the names of the owner of the real property assessed is cured by § 5 of Chap. 410 of the Laws of 1867, and such error does not render the assessment void.—*Haight v. The Mayor, &c., of New York et al.*, 54.
5. The notice of redemption from a tax sale must contain all the specifications pointed

out by the statute, and the courts cannot, by a rule of their own, dispense with any of those requirements.—*Simonton et al. v. Hays et al.*, 56.

6. In assessing the stock of corporations for the purposes of taxation it is the duty of the assessors to deduct the assessed value of the real estate from the actual value of the capital stock.—*The People ex rel. The 23d St. RR. Co. v. Comrs. of Taxes*, 84.
7. Where the real estate is situated in the same town, ward, city or county its assessed value may be ascertained from the assessment rolls; if situated in another State or country, or if for any other reason its assessed value cannot be obtained, the price paid for it may be taken as the assessable value.—*Id.*
8. A mandamus lies to compel a tax officer to receive a tax, although more than ten years have elapsed since the right to pay the tax accrued and the tax officer pleads the Statute of Limitations.—*The People ex rel. Townshend v. Cady*, 498.
9. The tax once proved to exist will be presumed to continue to exist, and being a lien on the property until paid, Ch. 381, Laws 1871, § 1, the right to remove the lien continues also.—*Id.*
10. Where the advertisement of a tax sale, under Laws 1871, Ch. 381, gives notice of the sale of various premises described in a certain list, upon different days named in the advertisement, and requiring redemption to be made on other days therein named, without specifying what lots are to be redeemed each day, a lease given thereunder is void.—*Townshend v. Williams*, 502.
11. But it will be held that such lease has enough presumptive validity to constitute a cloud on title; this, though the comptroller has not duly given the certificate provided for in § 16 of said act.—*Id.*
12. The assessors by mistake entered the valuation on plaintiff's personal property at \$4,000 instead of \$40,000. The mistake was discovered shortly after, but no correction was made until after the book was open for inspection. On grievance day relator was notified of the change and requested that the assessment be fixed at the original amount, which was refused. *Held*, Error; that the change made was not merely the correction of a clerical error, but one that concerned the substance and extent of the assessment.—*The People ex rel. Chamberlain v. Forrest et al.*, 516.

See CLOUD ON TITLE, 1; CORPORATIONS, 7, 10-12, 25; TRESPASS, 2.

TELEGRAPH COMPANIES.

See CORPORATIONS, 1, 10-12.

## TENANTS IN COMMON.

1. A tenant in common in possession of the premises cannot be held liable for rents and profits and use of the premises before he has been required by his co-tenants to yield to and recognize their rights, and has refused to do so.—*Vonderzee et al. v. Stingerland et al.*, 107.
2. Where one of several tenants in common is in occupation of the premises he is not chargeable with rent but must pay interest, taxes and ordinary repairs.—*McAlear v. Delaney et al.*, 252.

See CONVERSION, 3; EJECTMENT, 2.

## TENEMENT HOUSES.

See CONSTITUTIONAL LAW, 11.

## TITLE.

See ASSIGNMENT FOR CREDITORS, 5-7;  
TRUSTS, 7.

## TOWNS.

See TAXATION, 1.

## TRESPASS.

1. A complaint alleged that plaintiff's intestate was the owner of certain premises subject to the easement of a highway in a portion thereof, and that defendant wrongfully entered on the portion used as a highway and committed acts of trespass by running daily therein steam engines and cars, to the injury of said premises and plaintiff's business in the adjacent building. *Held*, That the facts alleged, if proved, would have made a good cause of action for trespass and that it was error to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action.—*Hussner v. The Brooklyn City RR. Co.*, 111.
2. The identity of the person named in a warrant for the collection of a tax may be shown by parol evidence, and that fact being shown justifies the officer in seizing his property for its payment.—*Woolsey v. Morris et al.*, 390.
3. A ministerial officer is protected in the execution of process, regular on its face, issued by a court, officer or body having a general jurisdiction of the subject-matter, or jurisdiction to issue it under special circumstances, although in fact jurisdiction did not exist in that particular case.—*Id.*
4. The bare levy by an officer under several processes at the same time, some of which are valid and others invalid, will not constitute him a trespasser, although the invalidity of the invalid ones was known to him or appeared on their face.—*Id.*

5. In an action of trespass the answer alleged that the property taken was owned by a third person and that all the alleged trespass was made under the direction and as the agents of said person. *Held*, Sufficient to authorize proof of such ownership and agency.—*Adams v. Robeson*, 468.

6. An action for trespass to real estate under the provisions of Code Civ. Pro., § 982, is still local, and must be brought in the county where the real estate is situate.—*Easton v. Booth*, 552.

## TRUSTEES.

1. All classes of trustees having money belonging to trust estates in their hands are bound to keep the trust funds separate and distinct from their own moneys; and, if deposited in bank for safe keeping, the money should be deposited to the credit of a separate account in their names as trustees; and if this be not done, and the court can see that by thus mingling the trust funds with their own the trustees have derived any benefit from their use, they are chargeable with interest, either simple or compound as the facts developed may require.—*In re The Commonwealth Fire Ins. Co.*, 57.
2. The pass-books of the trustee at the various banks where he kept his accounts are competent and proper *prima facie* evidence to show that he had mingled the trust funds with his own, and had drawn upon them by his individual check.—*Id.*
3. When by the terms of the will and the decree of the surrogate a fund is set apart with direction that the same be invested for and the proceeds paid to a beneficiary for life, and at his death such fund was directed to be paid to a legatee named, the executor after setting apart and investing such fund is entitled on the death of the beneficiary to commissions as trustee upon the investment and disbursement of the amount in addition to the commissions previously allowed to him as executor.—*In re accounting of Jackson*, 270.
4. On the acceptance of the resignation of a trustee and his discharge from the trust the court has power to award him an allowance for commissions, and if within the statutory limit its amount is discretionary and not subject to review in this court.—*In re petition of Allen*, 274.
5. An action may be maintained against a person individually upon whose authority materials have been furnished and labor performed, although such work was performed and materials furnished for the benefit of property belonging to him as trustee.—*Kedian et al. v. Hoyt*, 406.

See CORPORATIONS, 16, 21, 22; EXECUTORS, 6; TRUSTS, 2.

## TRUSTS.

1. Deceased, in 1828, executed an instrument whereby he acknowledged that he had in possession and held in trust for his sister a certain sum, being the balance directed by her father's will to be paid her by himself and his brothers, on which he agreed to pay interest and portions of the principal as her necessities required. *Held*, That deceased being a debtor of his sister at the time, his declaration of trust in the instrument could not change the character of his obligation; that upon the death of the sister's husband, in 1840, the claim for the money became vested in her and the statute of limitations began to run against her.—*In re accounting of Neilly*, 85.
2. It is only where there is an actual, continuing and subsisting trust that a trustee is precluded from setting up the statute of limitations.—*Id.*
3. Respondents, for the purpose of anticipating payment of their notes which had been discounted by the bank, gave their checks for the amounts of said notes, which checks were charged to respondents and their notes marked paid on the books. In fact the notes had been sold by the bank to other parties, of which fact respondents were ignorant, and the bank failed before maturity of the notes. *Held*, That a trust was created, the violation of which constituted a fraud by which the bank could not profit; that there was a specific appropriation of a particular fund for the payment of the notes; that the bank was estopped from claiming that the transaction was a mere matter of book-keeping, and that respondents were entitled to an order requiring the receiver to pay said notes.—*The People v. The City Bk. of Rochester*, 119.
4. An application for such purpose is a special proceeding, and costs may be awarded in the discretion of the court.—*Id.*
5. A conveyance of a portion of the grantor's real estate upon trust to pay certain creditors and to repay the surplus to the grantor is authorized and valid and an assignment of personal property upon such a trust with a reservation of the surplus does not violate the statute against personal uses.—*Knapp v. McGowan et al.*, 182.
6. The sixth and seventh clauses of the testator's will were as follows: "Sixth: The residue of my estate, both real and personal, \* \* I give, devise and bequeath to my daughter, Sarah L. Cooke, to have and to hold the same unto her and her heirs and assigns forever. Seventh: I commit my grand-daughter, Annie C. Lawrence \* \* to the charge and guardianship of my daughter, Sarah L. Cooke, in whose honesty, good-will and integrity I repose the utmost confidence. I enjoin upon her to make such provisions for said grandchild, out of

my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild and her own sense of justice and Christian duty shall dictate." *Held*, That a trust was created in favor of Annie C. Lawrence as a burden upon or condition of the enjoyment of the residuary estate of Sarah L. Cooke.—*Lawrence v. Cooke*, 257.

7. Testator devised his real estate to his executors in trust to sell the same and invest the proceeds and apply the income derived therefrom to certain purposes, and at a certain time to divide such proceeds between plaintiff and certain other beneficiaries. The executors omitted to sell the real estate, but at the time named, with the consent of the beneficiaries, divided the real estate itself among them, giving them proper conveyances therefor. *Held*, That plaintiff acquired a good title to his share of said real estate, and could convey the same.—*Fullon v. Edgar*, 429.
8. If money is directed by a will or other instrument to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may, in either case, if he elects so to do, prevent any conversion of the property from its present state and hold it as it is.—*Id.*

See BAR, 2; WILLS, 7.

## UNDERTAKING.

1. Under Chap. 486, Laws of 1881, an undertaking upon appeal executed by the appellant, the performance of the covenants and conditions of which are guaranteed by the Fidelity and Casualty Co. of N. Y., may be accepted and approved by the court.—*Hurd v. The Hannibal & St. Joseph RR. Co.*, 464.
2. Said act does not violate § 16 of Art. III. of the Const. prohibiting the passage of any local or private act embracing more than one subject, which must be expressed in its title. Moreover, the said act is not a private or local act, and consequently does not fall within said Constitutional provision.—*Id.*
3. The said act has so far modified the provisions of the Code of Civil Procedure requiring two sureties on an undertaking on appeal to the Court of Appeals as to dispense with them when a guaranty of the kind therein specified is given.—*Id.*
4. When such a guaranty is given the respondent has a right to examine the officer of the company as to its ability to enter into and make the guaranty.—*Id.*
5. An undertaking executed in any other case or manner than such as are provided by law are void.—*The Board of Corrections, &c., of Kings Co. v. Hammill et al.*, 494.

6. A bond taken for a greater sum than required by the order of the magistrate of a person declared a disorderly person under §§ 899, 900 and 901 of the Code of Criminal Procedure is void.—*Id.*
7. An undertaking on appeal, though defective in form, and not sufficient to give a stay of proceedings, may as against the sureties be supported, as any other contract, by sufficient consideration, which may be proved by circumstantial evidence, and the burden of proving which is on the party seeking to charge the sureties.—*Goodwin et al. v. Buntz et al.*, 509.
8. Where an undertaking, defective in that respect, is made for the purpose of obtaining a stay, and respondent at appellant's request withdraws his exception thereto, and the undertaking is approved on consent, and used to obtain a stay, and respondent relying solely on it does not issue execution, the sureties will be held liable thereon, especially when it does not appear that they knew of or took action on the exception to the undertaking.—*Id.*
9. In this case, where the judgment in replevin against three defendants was affirmed as to two defendants, it was *Held*, That there was a breach of the condition of the undertaking.—*Id.*

## USAGE.

1. A custom of trade whereby mechanics who are employed to make general repairs to buildings are accustomed to receive from mechanics in other lines of business whom it is necessary for them to employ in the course of making such repairs ten per cent. rebate of the bills furnished by them, and then charge this rebate against the person for whom the repairs are made, is vicious and unlawful and will not be sanctioned by the courts.—*Kedian et al. v. Hoyt*, 406.
2. In an action to recover the amount claimed to be due for making such repairs, the fact that plaintiffs have received such rebate is not a defence to the whole action, but only entitles defendant to a reduction of plaintiff's claim to that extent.—*Id.*

## USURY.

1. An usurious agreement made subsequent to the original loan cannot affect it, but simply avoids the notes given under said agreement.—*In re accounting of Consalus*, 1.
2. On accounting by an executor he claimed that a note held by the estate against himself was usurious and void. It was found that the original loan was valid, but that subsequently an agreement was entered into by which 10 per cent. interest was to be paid and that such payments were made. *Held*, That this did not invalidate

the original loan; that the claim, therefore, was a just claim against the executor, and that he was properly charged therewith.—*Id.*

See EVIDENCE, 6, 7.

## VARIANCE.

See DECEIT, 1.

## VENUE.

1. An action to set aside a general assignment which comprises real as well as personal estate is local and must be tried in the county where the real estate is situated.—*Acker et al. v. Leland et al.*, 366.
2. A motion to change the venue to such county may be made, although the complaint does not disclose that the assignment embraces real property; that fact may be shown by affidavit.—*Id.*

See TRESPASS, 6.

## VILLAGES.

1. Proceedings by a village incorporated under Chap. 291, Laws of 1870, to open and lay out a street are vitiated by any departure in substance from the formula prescribed by that act.—*The People ex rel. Johnson v. The Prest., &c., of Whitney's Point*, 301.
2. An omission in the petition of freeholders of the name of one of the landowners renders the petition defective and the proceedings void for want of jurisdiction, even though the land of such owner is very small, unless such owner's claim for damages has been waived.—*Id.*
3. An entry in the minutes of the board of a motion "that the improvement asked for in the petition be made," is not the entry of the decision of the board to make the improvement by resolution, as required by the statute. The resolution should be complete in itself so as to show what the improvement was.—*Id.*
4. If no notice of meeting to hear objections is served on a landowner the trustees have no authority to take his land and are without jurisdiction as to him unless he has waived service.—*Id.*
5. On an application for a mandamus to compel the trustees to make an assessment and levy a tax for opening a street the trustees are not estopped from gainsaying their acts as being illegal.—*Id.*

See EMINENT DOMAIN, 5, 6.

## VOLUNTARY ASSOCIATIONS.

See WILLS, 81, 40.

WAREHOUSEMEN.

See FALSE REPRESENTATIONS.

WARRANTY.

See AGENCY, 2; DEEDS, 3.

WHARFAGE.

1. A person owning land in the city of New York, lying under the navigable waters of the Hudson River, which land extends up to the side of a pier owned by another person, is not entitled to recompense for the use of the water over such land by vessels in approaching and lying at said pier.—*Coffin v. Scott et al.*, 418.

WILLS.

1. The due execution of a will may be proved by competent evidence even against the positive testimony of the subscribing witnesses.—*In re probate will of Cottrell*, 2.
2. The witnesses denied that they signed the attestation clause which was in regular form. The will was found among testator's papers, where he had during his last sickness stated it to be. The signatures of the witnesses were proved by comparison to be genuine, and a prior will duly cancelled was produced. *Held*, Sufficient to authorize a finding that the will was properly executed.—*Id.*
3. Testator bequeathed the residue of his estate to his executors in trust to convert it into personal property, divide it into equal shares and pay the income of one share to each of his children and the principal in certain proportions at the end of one, three and five years. The will provided that if either child died before the full payment of the whole of his or her share, such share should be paid, &c. *Held*, That the shares of the children vested at once on the death of testator; that the words "full payment" referred to the payment of the instalments, and it was not intended that the bequest should go over if for any reason payment was delayed beyond five years, but only in case the legatee died before any was payable or before full payment could be made.—*Finley v. Bent et al.*, 11.
4. A residuary clause carries all which is not legally disposed of by the will unless a contrary intention is manifested from the will itself.—*In re estate of L'Hommedieu*, 66.
5. While publication is essential to the validity of a will, it need not be in a particular, or any form of words. It is enough if in some way or mode the testator indicates that the instrument is intended or understood by him to be his will.—*Lane v. Lane*, 81.
6. Testator, who had a defect of speech rendering him unable to utter words, assented to sending for one W. as a witness to his will. W. was informed by the attorney that he was drawing the will and that they had sent for him as a witness. Testator read over the will, signed it, and handed it to the witnesses to sign. *Held*, A sufficient declaration.—*Id.*
7. Testatrix bequeathed her residuary estate absolutely in joint tenancy to her executors, upon whose advice, it appeared, she was seriously dependent. She left a contemporaneous letter to the legatees, directing them to devote the income to certain charities by doling out the interest to persons of their selection, and to devote any surplus to charities to be selected by them. The executors deny any promise or agreement to hold for the benefit of others. *Held*, That the letter and the other facts relieved the executors from the charge of undue influence, and that as the proposed arrangement is an effort to carry out by a secret trust what could not, on the face of the will, be done, the legatees are trustees for the heirs and next of kin.—*In re probate will of O'Hara*, 87.
8. The fact of insufficiency of personal estate to pay a legacy is of but slight significance in charging its payment on real estate if testator is not shown to have been aware of such insufficiency.—*Defreest v. Defreest et al.*, 96.
9. Testator left a legacy to plaintiff, gave one-third of the income of the whole of his estate to his widow in lieu of dower and gave the residue to his infant daughter. The will contained no provision for the payment of debts nor any power of sale. On a settlement by the executors two years after testator's death the personal property proved insufficient to pay debts and expenses. It did not appear whether there had been a loss or depreciation of the personal property. *Held*, That the legacy was not a charge on the real estate, but entirely abated.—*Id.*
10. By the will of V. all his property was devised to C. "subject to the proviso hereinafter contained." The will then provided for the support of the widow, gave certain legacies which were to be paid by C. within two years, and finally provided that if C. should die without issue the estate should go to testator's grandchildren. C. outlived testator thirty-six years and then died without issue. *Held*, That the estate devised to C. was a conditional fee, and that C. having died without issue the estate passed to the grandchildren.—*Vanderzee et al. v. Slingerland et al.*, 107.
11. An absolute interest given in one clause of a will cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or by clear and undoubted implication.—*Freeman v. Coit*, 161.



12. Testatrix devised two-thirds of her estate to her children and one-third to her husband and mother equally. The will then provided that if all the children die before the age of twenty-one the husband shall have \$20,000 in full of all right or claim to the estate under the will, and the mother the residue. *Held*, That there was a present and absolute gift to the husband and mother of one-third of the estate, which was not cut down by the subsequent provision.—*Id.*
13. A will made in Massachusetts and valid under the laws of that State provided for twelve life annuities and then directed that the residue should remain in the hands of the executors well and safely invested until the death of the last annuitant, to be then divided as directed with the accumulations. It contained no express direction for a conversion of the real estate into personalty. *Held*, That there was not an equitable conversion of the real estate, and that the direction as to the residue was invalid as to the real estate in this State as it was repugnant to the statutes of perpetuities and as to accumulations.—*Hobson et al. v. Hale et al.*, 218.
14. While the mere fact that a legatee was the attorney of testatrix creates no presumption against the validity of the legacy, yet that fact taken in connection with a change of testamentary intention, great age of testatrix, that the will was executed during her last sickness, and without independent advice, and that the attorney was the draftsman and took an active part in procuring the execution of the will, makes a case which imposes the burden upon him of satisfying the court that the will was the free and intelligent expression of testatrix' wishes and intention.—*In re probate will of Smith*, 220.
15. Evidence of the attorney in such a case as to the contents of other wills of testatrix drawn by him and as to the circumstances attending the making thereof is incompetent under § 829 of the Code against a contestant who claims as legatee under a former will.—*Id.*
16. A bequest to certain beneficiaries specifically named, *Held*, In the light of surrounding circumstances to be a gift to the beneficiaries named as a class, and not as individuals.—*Page v. Gilbert et al.* 222.
17. Proof of interest and opportunity is not sufficient to invalidate a will for coercion or undue influence, but affirmative acts must be shown which of themselves or by just inference establish one or the other of these grounds of complaint.—*In re probate will of Ellick*, 231.
18. To invalidate a will the influence must be such as to deprive testator at the time of the free exercise of his will, and must be exercised in respect to the very act.—*Id.*
19. Where there is direct, positive and unequivocal evidence gainsaying the exercise of such influence and showing capacity, mature deliberation, settled purpose and absence of fraud and imposition, the will must be carried into effect.—*Id.*
20. Where, on appeal from a decree refusing to admit a will to probate on the ground of undue influence, the court is in doubt as to the correctness of the surrogate's decision, the proponent is entitled to have the case reconsidered by a jury.—*Id.*
21. The will of testatrix, after providing that her executor should hold two parcels of real estate in trust, to apply the income thereof to the maintenance of her mother and youngest son, or should sell the same and apply the income derived from the proceeds to the same purpose; and that, upon the death of her mother and the coming of age of her youngest son, one of such parcels, or the avails thereof if it should have been sold, should be given to her youngest son, contained the following clause: "And all the rest, residue and remainder of my property and estate I do then give, devise and bequeath to my children John, Thomas and Mary, the survivor and survivors of them, share and share alike." *Held*, That the right to take the residuum of the estate vested at the time of the death of the testatrix in the three children named; and that no special intent to the contrary appearing in the will, its reference to survivorship must be construed as referring to the death of the testatrix, the word "then" as indicating the time when the estate in remainder was to be actually enjoyed.—*In re accounting of Mahan*, 239.
22. When the scheme of a will provides for final distribution of the estate and evinces an intention on the part of the testator that the realty should be sold and converted into money, and such intention has been carried into effect, the will should be construed as directing the equitable conversion.—*Id.*
23. The will of the testatrix devised her estate in trust to her executors to divide the same into six equal parts; to convey two of such parts to two of her sons; to divide the income of the remaining four equal parts among her three remaining sons and her daughter in equal shares equally during their several and respective lives; upon their several and respective deaths to convey the shares of the principal producing the income of the one so dying to his or her child or children upon their arriving at the age of twenty-one years, and to the issue of any such children who might be deceased at the death of his parent, but if any such children should die

- before the age of twenty-one and without leaving issue, then the share of the one so dying should become part of the residuary estate for the benefit of all the testatrix' children, in the same share and under the same trusts and limitations before provided for; and in the event of either of the testatrix' children dying without issue, but leaving a wife or husband surviving, then the income of the share of the one so dying should be paid to the surviving wife or husband during life, and after the death or marriage of such surviving wife or husband should be divided according to the terms of the will. *Held*. No unlawful suspension of alienation.—*Tiers v. Tiers et al.*, 243.
24. To invalidate a will on the ground of undue influence there must be affirmative evidence of the facts from which such influence is to be inferred. Proof that the party to be benefited had the motive and opportunity to exert such influence is not sufficient.—*In re probate will of Phelps*, 293.
25. A mere change of purpose in making a testamentary disposition of property will not invalidate a will without proof of other pertinent and forcible acts showing undue influence.—*Id.*
26. Testator by his will gave the use of \$4,000 to his widow for life, with privilege to use the principal if necessary; he then gave the residue of his property, together with what should remain of the \$4,000, to his daughter S., and provided, in case of the death of S. without issue before the widow that all the property left by the daughter "at her death which shall belong to me at my death," together with what should remain of the \$4,000, should go to the widow. S. died before the testator. *Held*. That the intention of testator was to give to the survivor the entire estate undisposed of on the death of either, and that only a life estate was given to the daughter.—*Wager et al. v. Wager*, 318.
27. By an antenuptial agreement made prior to the married women's acts the wife's real estate was conveyed to a trustee with reservation of a right to the wife to devise the same to her husband or her issue in such shares as she deemed proper. She executed a will referring to said contract. She and her husband received the rents, &c., of the property, giving receipts therefor to the trustee. *Held*. That it was competent under the agreement for the trustee to allow them to use, occupy and enjoy the property; that the receipts given, the reference to the contract in the will and the execution thereof were acts sufficient to show a ratification of the contract, and that the husband's creditors could not set up the wife's infancy for their own benefit; that the will conveyed only the property embraced in the contract.—*Beardsley et al. v. Hotchkiss et al.*, 325.
28. The will devised all the wife's property to her children, and provided that if any died under twenty-one without leaving issue the share of the one so dying should go to the survivors. *Held*. That there was no illegal suspension of alienation.—*Id.*
29. One of the children died under age without issue. *Held*. That the unexpended income of his share passed to his father as his next of kin.—*Id.*
30. The children were supported, maintained and educated by their father during their minority and resided with him after they came of age. *Held*. That they were not chargeable with the sums expended for their support, education and maintenance.—*Id.*
31. A voluntary unincorporated association is incapable of taking a legacy, and a legacy bequeathed to such an association is invalid, and the property so bequeathed vests in the testator's next of kin if not otherwise disposed of, and the subsequent incorporation of the association will not divest the title of the next of kin.—*Shipman v. Rollins et al.*, 370.
32. The testator bequeathed to his wife the income of a certain portion of his real estate for life and directed his executors to sell so much of the remainder of said real estate as should be necessary to create a fund which would produce an income of \$1,500, which he directed to be paid to his wife for life, and after her death he directed the remainder of his real estate to be sold and a fund created which should be divided into eight portions. The will then contained the following clause: "One portion I give to the American and Foreign Christian Union." *Held*. That the legacy to said American and Foreign Christian Union vested at the death of the testator.—*Id.*
33. The will also contained the following clause: "Two other portions I give to the first Reformed Low Dutch Church that may be built after the year 1856 between the Fifth avenue and the East River and Seventy-ninth and Ninety-fifth streets." *Held*. That if this legacy was contingent it created an unlawful suspension of alienation.—*Id.*
34. The mere lack of recollection of one subscribing witness as to material points does not impair the force of affirmative evidence as to the same points furnished by the other subscribing witness and the attestation clause.—*Whitfield et al. v. Whitfield et al.*, 386.
35. The statute does not confine the proponent of a will to the testimony of the subscribing witnesses, nor compel him to examine them as to testator's testamentary capacity.—*Id.*

36. In 1846 defendant's testatrix, her husband and one C. entered into a marriage settlement agreement whereby certain property was conveyed to C. upon trust to apply the income thereof to the use of defendant's testatrix during her life and "from and after her decease, upon trust to convey and transfer the said premises to such person or persons, to such uses and purposes and in such manner as she by her last will and testament \* \* \* may, whether sole or covert, direct, limit or appoint." Defendant's testatrix subsequently entered into an agreement with her son, upon paying to him his share of his father's estate, of which she was executrix, to hold him harmless from a judgment which had been recovered against her as such executrix and to pay and satisfy said judgment; and her will, which was subsequently made, contained the following clauses: "And whereas an application is about being made to the Supreme Court for leave for my trustee to apply so much of the principal of the trust estate as may be necessary to carry out said contract, now, therefore, in and by this will, pursuant to the authority contained in said trust deed, I do hereby authorize, ratify and confirm such application of so much of the principal as may be found necessary to carry out said agreement, whether the same shall, or shall not, be confirmed by the court." In an action to compel her executor to pay the said judgment, *Held*, That her will contained a valid execution of the power conferred upon her by the marriage settlement agreement.—*Kinnan v. Guernsey et al.*, 410.
37. Where a testator is shown to have been competent, and where no suspicious circumstances were attendant on the execution of her will, the mere fact that out of a total estate of \$49,000, \$9,000 was bequeathed to one of the executors who had been for years the testator's legal adviser is not sufficient to justify a decree refusing to admit that will to probate.—*Coffin v. Lattin*, 434.
38. Where proponents of an alleged lost will failed to give any evidence that the paper was duly executed as a will, although the deceased declared it to be his will, *Held*, That proponents failed to make out a *prima facie* case.—*In re probate will of Russell*, 435.
39. When a testator devises real property to his son and said son's heirs, but if he dies without issue then to the testator's other children it will be held that the contingency referred to is the death of the son in the lifetime of the testator, and by such son's survival he takes an absolute estate.—*Leonard v. Kingland*, 473.
40. A voluntary unincorporated association cannot, under the law of this State, take a legacy given to it under the will of a person domiciled in Connecticut, notwithstanding under the laws of that State the bequest would be good and the legatee could take. The capacity of the legatee to take and receive the bequest is to be determined by the laws of the State of New York and not by the laws of the State of Connecticut.—*Mapes v. The American Home Missionary Society*, 493.
41. Where testator by his will gives to his wife a certain sum which is to be accepted and received by her in lieu and bar of her dower and of all claims she may have upon or against his estate as his widow, she takes no portion of a dower interest in that part of the estate undisposed of by reason of legacies having lapsed or invalid dispositions in other ways. Such lapsed legacies fall into the residue, and pass to the residuary legatees.—*Adams et al. v. Benson et al.*, 532.
42. To ascertain the amount of a general residue, all income of the estate not otherwise disposed of must be added to the residue.—*Id.*
43. Bequests to religious corporations, created under the act of 1813, are not included within Chap. 319 of the Laws of 1848, invalidating bequests to benevolent, charitable, scientific and missionary societies when the will is made within two months of the testator's decease.—*Harris et al. v. The American Baptist Home Missionary Society et al.*, 564.
44. The Legislature, by amending the act incorporating the American Baptist Missionary Society by eliminating from it a provision subjecting it to the Statute of 1848 (*supra*), and substituting in its place a provision, subjecting it to Chap. 360, Laws of 1860, relieved this society from the restrictive operation of the provisions of the Act of 1848.—*Id.*
- See APPEAL, 6; 10; 11; COSTS, 8, 9; EXECUTORS, 10, 11; TRUSTS, 6-8.

## WITNESS.

See CONTEMPT, 2-6; EVIDENCE, 8, 16, 18, 19, 25; SLANDER, 2.





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